Office Supreme Court
APR 3 1981
ALEXANDER L. STEVAS, CLERK

80-1829

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

T. EDWARD AUSTIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS STATE ATTORNEY, FOURTH JUDICIAL CIRCUIT, STATE OF FLORIDA, Et al., PETITIONERS

V

ALICE ROBERTS, et al., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE UNITED STATES SUPREME COURT

For Petitioners:

Stephen R. White
Assistant State Attorney
State Attorney's Office
Duval County Courthouse
Jacksonville, Florida 32202
904-633-6910

Leo J. Stellwagen
Assistant District Council
Dept. of Health and
Rehabilitative Services
P. O. Box 2417-F
Jacksonville, Florida 32211
904-725-3080

QUESTIONS FOR REVIEW

Whether federal regulations pertaining to food stamps lawfully prohibit the State Attorney's Office of the Fourth Judicial Circuit of Florida from looking at the files of food stamp recipients to determine if fraud is present so that access to the files should be enjoined. The answer to this question depends upon (1) whether the relevant federal regulations do prohibit this access and (2) whether such prohibitive application of the federal regulations reaches beyond the intent of underlying Congressional legislation, and, thereby, is invalid.

List of Parties

Petitioner-defendants

T. Edward Austin (erroneously listed in early pleadings by plaintiffs below as Edward T. Austin) individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida

Maurice Atwater, individually and in his official capacity as Assistant State Attorney, Fourth Judicial Circuit, State of Florida

Thomas Saitta, individually and in his official capacity as Assistant State Attorney, Fourth Judicial Circuit, State of Florida

David C. Pingree, in his official capacity as Secretary, State of Florida, Department of Health and Rehabilitative Services

Paul Ayers, individually and in his official capacity as Supervisor, Nassau County Food Stamp Office, District IV, State of Florida, Department of Health and Rehabilitative Services

Herbert M. Surles, individually and in his official capacity as Food Stamp Specialist, District IV, State of Florida, Department of Health and Rehabilitative Services

Respondent-plaintiffs

Alice Roberts
Mary Jo Roberts
Jane Doe
All other persons similarly situated

TABLE OF CONTENTS

	Pages
Questions for Review.....	i
List of Parties.....	i-ii
Table of Contents.....	iii
Table of Authorities.....	iv
Reported Opinions Below.....	1
Jurisdiction.....	1-2
Constitutional, Statutory, and Regulatory Provisions.....	3
Statement of the Case.....	4-14
Reasons for Allowing Writ.....	15-36
Appendix	
Opinion of Decision Sought to be Reviewed.....	App. 1-55
Other Opinions and orders in the Case.....	App. 56-80
Constitutional, Statutory, and Regulatory Provisions.....	App. 81-174

TABLE OF AUTHORITIES

CASES

	Pages
Branzburg v. Hayes, 408 U.S. 665 (1972).....	33-34
Davis v. United States, 328 U.S. 580 (1946).....	30
Eagan v. Demanio, 294 So.2d 639 (Fla. 1974).....	19, 30
Florida v. Sievert, 312, So.2d 788 (2nd Dist. Ct. App., Fla 1975)...	20
Imbler v. Pachtman, 424 U.S. 409 (1976).....	18
Imperato v. Spicola, 238 So.2d 505 (Fla. 1970).....	20
New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973).....	31
Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980).....	1, 16, 22 25, 28, 30 App. 1-55
United States v. Martinez-fuerte, 428 U.S. 1116 (1976).....	29

CONSTITUTIONAL PROVISIONS

Article I, §15, Florida Constitution.. 19, App. 81

Article V, §17, Florida Constitution.. 19, App. 82

STATUTES

7 U.S.C. § 2011..... 17, 31, App. 83-84
7 U.S.C. § 2013..... 31, App. 84-87
7 U.S.C. § 2014 (a)..... 31, App. 87-88
7 U.S.C. § 2020 (a)..... 30, App. 88-89
7 U.S.C. § 2020 (e)(8)..... 34, App. 89
28 U.S.C. § 1254 (1)..... 2, App. 89-90
28 U.S.C. § 1331..... 9, App. 90-91
28 U.S.C. § 1337..... 9, App. 91-93
28 U.S.C. § 1343 (a)(3),(4).. 9, App. 93
§27.02, Florida Statutes..... 19, App. 93
§409.325, Florida Statutes... 5, 7, 35, App. 94-100

REGULATIONS

7 C.F.R. § 272.1 (f)..... 30, App. 101-102
7.C.F.R. § 272.4 (e)..... 30, App. 102-109
7 C.F.R. § 273 Heading..... 24, App. 109
7 C.F.R. § 273.2..... 22, App. 109 et seq.
7 C.F.R. § 273.2 (e)..... 21, 22, App. 115-119
7 C.F.R. § 273.2 (f)..... 21, App. 119 et seq.
7 C.F.R. § 273.2 (f)(4).... 22, App. 135-172
7 C.F.R. § 273.16(e)..... 24, App. 172 et seq.
7 C.F.R. § 273.16(e) 2..... 22, 33, App. 172-174

OTHER AUTHORITIES

Rule 17.1, Rules of the Supreme Court of the United States..... 15

Rule 17.1 (c), Rules of the Supreme Court of the United States..... 16

Establishing Priorities Among Programs Aiding the Poor, Hearing before the Senate Finance Committee, 92d Cong., Second Sess. at 149 (Feb. 15, 1972)..... 27, 36

REPORTED OPINIONS BELOW

Petitioners seek review of the decision of the United States Court of Appeals for the Fifth Circuit reported at Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), and contained herein at Appendix P. 1. (Roberts v. Austin, Id., reversed the denial of a petition for preliminary injunction by United States District Court for the Middle District of Florida, the district court's opinion being unreported but contained herein at Appendix 72.)

JURISDICTION

Petitioners seek for this Court to review the decision of Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980); the opinion of Roberts v. Austin, is dated December 15, 1980; this decision was entered on January 13, 1981, in that on that date the

United States Court of Appeals for the Fifth Circuit entered its order denying petitioners' Suggestion for Rehearing En Banc, and issued its mandate. Petitioners seek a writ of Certiorari pursuant to 28. U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

In that the involved constitutional, statutory, and regulatory provisions are lengthy, they are set out verbatim at Appendix pages 81-174. Their citations are as follows:

Constitutional Provisions

Article I, §15 Florida Constitution
Article V, §17 Florida Constitution

Statutory Provisions

7 U.S.C. §2011
7 U.S.C. §2013
7 U.S.C. §2014 (a)
7 U.S.C. §2020(a)
7 U.S.C. §2020(e)(8)
28 U.S.C. §1254(1)
28 U.S.C. §1331
28 U.S.C. §1337
28 U.S.C. §1343(a)(3), (4)
§27.02, Florida Statutes
§409.325, Florida Statutes

Regulations

7 C.F.R. §272.1 (f)
7 C.F.R. §272.4 (e)
7 C.F.R. §273 Heading
7 C.F.R. §273.2
7 C.F.R. §273.2 (e)
7 C.F.R. §273.2 (f)
7 C.F.R. §273.2 (f)(4)
7 C.F.R. §273.16 (e)
7 C.F.R. §273.16 (e)2

STATEMENT OF THE CASE

The circumstances precipitating this law suit were generated by an inquiry by the State Attorney's Office, Fourth Judicial Circuit of Florida. This Fourth Judicial Circuit is comprised of Nassau County, Florida, Clay County, Florida, and Duval County, Florida.

Indications from the United States Department of Agriculture, Florida's Department of Health and Rehabilitative Services (HRS), and Florida's Department of Public Assistance Fraud that food stamp fraud was generally rampant came to the attention of personnel in the State Attorney's Office for the Fourth Judicial Circuit of Florida. Information was related to Maurice Atwater, an Assistant State Attorney in the Fourth Judicial Circuit, that the rate of food stamp fraud is likely to be as high as forty (40) percent of all food stamp cases. Based on

this information, an inquiry by personnel of the State Attorney's Office ensued to inquire into possible violations of Section 409.325, Florida Statutes, which renders food stamp fraud a criminal violation of state law in Florida. The investigation began by personnel of the State Attorney's Office seeking and obtaining access to those food stamp files in Nassau County that involved the receipt of in excess of one hundred twenty-five dollars worth of food stamps. The rationale for this threshhold amount was that such cases were more likely to involve fraud. The threshhold was ultimately lowered to approximately one hundred dollars. As a result, personnel of the State Attorney's Office looked at approximately three hundred food stamp files and transcribed several items from the files onto forms constructed for the inquiry. The files were obtained from H.R.S., the state agency

in charge of administering the Food Stamp Program in Florida. The items were selected because of their relevance to the amount of food stamp issuance and, therefore, to potential fraud. These forms were then given to local police officers to verify this issuance-relevant information. The officers were given express instructions by the State Attorney's Office to not unnecessarily discuss this information with anyone. Initially, the police did not even know the subject of the inquiry. The police's work yielded one hundred twenty cases in which questionable information was found. Of these cases, seventy-eight (78) suspects were arrested for food stamp fraud. Of those arrested, sixty-seven (67) had pled guilty, plead nolo contendere, or been found guilty at trial by April 29, 1980. Seven (7) have been dropped by the State Attorney's Office or found not guilty.

Except for one deceased defendant, the balance had not been disposed of by April 29, 1980. The foregoing statistics compute to a successful prosecution rate of 91%. (67/74 = .91). As of April 29, 1980, upwards to approximately $15,500 in restitution had been ordered as a part of judicial sentences.

A similar method was used in Clay County. There, the April, 1980, statistics are as follows: Approximately 300 to 350 cases reviewed by the State Attorney's Office; 61 arrests; 93.8% successful prosecution rate (30/32 = .9375); approximately $10,500 as amount of restitution ordered as of April 25, 1980.

During 1977, 1978, 1979, and 1980 (until April 28, 1980) there have been a total of 165 cases filed in Nassau and Clay Counties alleging a violation of Section 409.325, Florida Statutes, the statute including inter alia the food stamp fraud

provision. Eighty-four percent of these were the product of the foregoing investigation of the State Attorney's Office (139/165 = .84).

The State Attorney's Office intends to use a similar technique in Duval County.

Respondents (plaintiff below) have been food stamp recipients who through their legal aid lawyers filed a class-action suit in the United States District Court, Middle District of Florida, Jacksonville Division, and complained that T. Edward Austin, individually and in his official capacity as the State Attorney for the Fourth Judicial Circuit of Florida, and two of his Assistant State Attorneys, Maurice Atwater and Thomas Saitta, and further, David C. Pingree, in his official capacity as Secretary for the State of Florida, Department of Health and Rehabilitative Services, Paul Ayers, individually and in his official capacity as

a Supervisor in the Nassau County Food Stamp Office, and Herbert M. Surles, individually and in his official capacity as a Food Stamp Specialist for Florida's Department of Health and Rehabilitative Services, violated certain rights of food stamp recipients due to the above-described inquiry. Mr. Austin is the chief prosecutorial officer throughout the Fourth Judicial Circuit and his authority and duties, as well as those of his assistants, such as Mr. Atwater and Mr. Saitta, extend throughout that Circuit. The suit was filed under jurisdictional statutes 28 U.S.C. §1343(3) and (4), 28 U.S.C. §1331, and 28 U.S.C. §1337. It alleged that Mr. Austin, Mr. Atwater, and Mr. Saitta violated constitutionalized privacy rights of food stamp recipients in Nassau and Clay Counties by obtaining information from their files containing applications and other documents attendant to their

application for, and receipt of, food stamps. These documents, as well as the administration of the food stamp program in Florida, are within the purview of Florida's Department of Health and Rehabilitative Services (H.R.S.). It has been further claimed that any execution of a plan for similar access in Duval County should be enjoined. The suit requested injunctive, declaratory, and monetary-damage relief.

Similar relief was sought regarding Mr. Pingree, Mr. Ayers, and Mr. Surles, except allegations of violating federal regulations and due process were added to the claim against them.

The law suit was filed as a class action with the Clerk of the District Court in February, 1980. The class has not been certified. Judge William Castagna, the District Court judge presiding over the case, denied plaintiffs' Motion for

Temporary Restraining Order by Order dated March 3, 1980. The Order ruled that the suit did not have the requisite probability of success to warrant issuing a Temporary Restraining Order and that no threat of immediate and irreparable injury was demonstrated. On March 14, 1980, a Motion to Dismiss was filed on behalf of Mr. Austin, Mr. Atwater, and Mr. Saitta. Soon thereafter, a Motion to Dismiss was filed on behalf of Mr. Pingree, Mr. Ayers, and Mr. Surles. Affidavits were filed in support of the Motions to Dismiss. Judge Castagna has not yet ruled on these motions. The depositions of Mr. Atwater, Mr. Saitta, an H.R.S. employee, and two investigators of the State Attorney's Office were taken on March 19 and 21, 1980.

On March 28, 1980, Judge Castagna heard arguments pertaining to legal aid's Motion for Preliminary Injunction. The Motion for Preliminary Injunction was

denied by Order dated April 11, 1980; this order reaffirmed and elaborated on the reasoning in the order denying the Motion for a Temporary Restraining Order.

Legal aid took an appeal to the United States Court of Appeals, Fifth Circuit, and requested from the District Court an injunction pending appeal and, in the alternative, an injunction to allow them time to seek such an injunction from the Fifth Circuit Court of Appeals. The District Court did not grant the former, but did grant the latter for twenty days by Order dated May 12, 1980. The Order enjoined H.R.S. from releasing food stamp case files to Mr. Austin "in the absence of reasonable suspicion of fraud or a search warrant." Thereafter, legal aid sought an injunction pending appeal from the Fifth Circuit Court of Appeals. On June 4, 1980, the Fifth Circuit denied legal aid's Motion for Injunction Pending Appeal.

On December 15, 1980, by an opinion written by the Honorable Judge Hatchett, the three-judge panel of the Fifth Circuit reversed Judge Castagna's denial of the Motion for Preliminary Injunction. The Honorable Judge Hill concurred specially. The three-judge panel held that State Attorney access to a food stamp recipient's file violated federal food stamp regulations where there is no reasonable suspicion of fraud as to that file. The opinion indicated that H.R.S. will determine when there is a reasonable suspicion. Constitutional issues were not reached. The Fifth Circuit by Order entered January 13, 1981, denied a Motion to Stay Mandate and denied a Suggestion for Rehearing En Banc filed by the current petitioners for a writ of Certiorari. Consequently, the case has been remanded to the District Court and there a preliminary injunction has issued. Now, legal aid by a

memorandum in response to H.R.S.'s Motion for Clarification of the preliminary injunction order is attempting to require a full due-process hearing prior to any release of a recipient's file in a State Attorney investigation.

REASONS FOR ALLOWING WRIT

Petitioners respectfully submit that it is travesty to deny the State Attorney's Office access to certain food stamp recipients' files where there is reliable information that the fraud rate may be as high as forty percent (40%). At stake here is the viability and integrity of not only the State Attorney's Office, but also the federal Food Stamp Program itself. Nothing is more universally basic than the hunger need. No law enforcement agency in Florida is more basic than that of the State Attorney's Office. Consequently Petitioners submit that there are "special and important reasons," Rule 17.1, Rules of the Supreme Court of the United States, for granting this writ. The Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this

Court. Rule 17.1(c), Rules of the Supreme Court of the United States.

The Fifth Circuit's decision would seriously impede local law enforcement from looking into an area where the suspected fraud rate is forty percent (40%). Such a concentration of criminal activity would have a material bearing on the success of a noble federal program, i.e. food stamps. Furthermore, the decision would render local law enforcement utterly powerless to look into yet other areas of criminal activity having a material bearing on the Food Stamp Program.

The statistics cited in the foregoing pages and cited in Roberts v. Austin, 632 F.2d 1202, 1215 n.1, App. 55 (5th Cir. 1980), are indicative of the effectiveness of the State Attorney's inquiry prior to its being enjoined. The successful prosecution rate was in excess of ninety percent (90%). As a result of the

injunction there will be no prosecutions based on the State Attorney's inquiry.

In essence, the State Attorney's enjoined inquiry promoted the ultimate purpose of the Food Stamp Act: "to safeguard the health and well-being of the nation's population by raising levels of nutrition among low income individuals." 7 U.S.C. §2011. This, and similar language in the Food Stamp Act (for example, "to alleviate such hunger and malnutrition," Id.) should be the guiding litmus for interpreting the Food Stamp Act and regulations purportedly promulgated under it. In ferreting out the food stamp cheats, the State Attorney's inquiry promoted the ultimate purpose of the Food Stamp Act by ensuring that its funds were being devoted to "low-income individuals," enhanced the public's perception of the Food Stamp Act that its resources were going to the truly needy, and enforced a Florida Statute

rendering food stamp fraud a state crime.

Petitioners respectfully submit that the Fifth Circuit's decision loses sight of this fundamental test, the purpose of the Food Stamp Act. This petition is particularly timely in this era of national austerity, national concern with excessive federal regulation and with stealing from programs such as this, and current public evaluation of the Food Stamp Program.

Petitioners further submit that the injunction encroaches upon the legitimate functions of the State Attorney's Office. An injunction prohibiting H.R.S. from releasing the files to the State Attorney until H.R.S. determines a reasonable suspicion of fraud has the practical effect of enjoining this legitimate mode of inquiry by the State Attorney. An injunction undermines the "courage and independence," Imbler v. Pachtman, 424 U.S. 409, 423-25 (1976), with which the State

Attorney's Office should conduct its functions. And, the legitimate functions of the State Attorney's Office in Florida are quite broad.

The general scope of the authority of the State Attorney's Office is succinctly described by the Florida Supreme Court in Eagan v. Demanio, 294 So.2d 639, 640 (Fla. 1974):

> The state attorneys are constitutional officers (Fla. Const. art. V, §17, Fla. Stat. Ann.), in whom the Legislature vested the duty to prosecute (Fla. Stat.,§27.02, Fla. Stat. Ann.). Before filing an information under oath (Fla. Const., art. I, §15 Fla.Stat.Ann.), they necessarily must conduct an investigation to determine whether or not they should execute the statutory oath . . . .Investigating activity is necessary to the efficient execution of a prosecutor's duty. . . .

Accordingly, a Florida District Court of Appeal has indicated that "[a] State Attorney's power to investigate should not lightly be circumscribed by protective orders designed to accommodate the

convenience of witnesses." Florida v. Seivert, 312 So.2d 788, 791 (2d Dist. Ct. App., Fla. 1975). The Florida Supreme Court has even gone so far as to describe the State Attorney as a "one-man grand jury." See Imperato v. Spicola, 238 So.2d 505, 506 (Fla. 1970).

The broad scope of the State Attorney's authority in Florida, of course, would never legitimize an intrusion into a federally preempting and cognizable right. The only rights here, however, are those woven with thin strands in the minds of respondent-plaintiffs. They are fancied or imagined "rights," which are insufficient to provide the basis for any injunction.

In contrast to the State Attorney's pursuit of legitmate functions and promotion of the intent of the Food Stamp Act, the Fifth Circuit and respondent-plaintiffs have cited no statutory or regulatory provision that expressly

prohibits access to food-stamp recipient files. Instead, inference is built upon inference; and, remote analogies are involved.

First, the Fifth Circuit relies upon 7 C.F.R. §273.2(e) that provides that the food stamp applicant's interview with the caseworker shall be confidential. Yet nothing is cited indicating any broader intent than an interest in the confidential circumstances surrounding each interview per se. The regulation states: "The applicant's right to privacy shall be protected during the interview." (Emphasis supplied) It continues by treating the facilities of the interview. A reasonable interpretation is that forthrightness by the applicant is encouraged for the interview.

Another regulation relied upon is 7 C.F.R. §273.2(f), which limits the circumstances by which a worker certifying

an applicant's eligibility for food stamps can verify the information given by the applicant. Like 7 C.F.R. §273.2(e), this regulation concerns application processing by H.R.S. Hence, §273.2 of 7 C.F.R. is entitled "Application processing." Similarly, any reliance upon 7 C.F.R. §273.2(f)(4) and related regulations limiting the primary source of verification by H.R.S. caseworkers to evidence provided by the household is misguided.

Indeed, all of the subsections of §273.2 have something in common with yet another regulation relied upon by Roberts v. Austin, 632 F.2d 1202, App. 1, that is, 7 C.F.R. §273.16(e)(2). Roberts v. Austin, id. at 1210, App. 24-26, cites the regulation as indicating a careful limitation of referrals for prosecution to those "'cases where individuals are suspected committing fraud.'" The purpose of this regulation,

however, is to "encourage" such referrals for prosecution. The interest expressed is to ensure that significant fraud is vigorously pursued. Hence, the regulation continues by encouraging the referrals "particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one fraudulent act." The intent here is clear: H.R.S. is to especially refer for prosecution cases that hurt the public purse the most. The public purse and integrity of the Food Stamp Program are the paramount concerns. There is nothing in this regulation or any other regulation to suggest that H.R.S. referrals are the only route that eventual prosecution may take. Here, the interests of the State Attorney's Office and those of this regulation coincide: the protection of the public purse and the maintenance of the integrity of a noble program.

In sum, the basis for the injunction is regulations that simply nowhere expressly limit the access of local law enforcement to food stamp recipient files. Instead, these regulations are intended to primarily govern the exclusively internal operations of H.R.S. Hence, the daily operations of a Food Stamp issuing agency are limited in their verification procedures. Part 273 of 7 C.F.R., under which all of the above regulations are subsumed, is entitled "Certification of Eligible Households," and the subsections of Part 273 pertain to the exclusively internal operations of the issuing agency. In a rare divergence from this homogeneity, 7 C.F.R. §273.16(e) recognizes the authority of a state court to disqualify an individual from food stamp benefits "if t court finds the individual guilty of civil or criminal fraud." This disqualification is "separate and apart from any action

taken by the State agency to disqualify the individual through an administrative fraud hearing." Id. In other words, the regulations expressly recognize a procedure for disqualifying a food stamp recipient -- that is, rendering the recipient ineligible -- which is totally outside of the regulations, i.e., the state court system with its procedures and authorities. One such authority is the State Attorney's Office.

In contrast to this obvious regulatory intent that the state criminal justice system pursue food stamp fraud, Roberts v. Austin, 632 F.2d 1202, App. 1, would entirely preclude inquiries by the State Attorney's Office in cases involving corruption by caseworkers in HRS.

The Fifth Circuit and respondent-plaintiffs have never adequately coped with this argument. Roberts v. Austin, id. at 1211, App. 1, prohibits the release of a

recipient's file to the State Attorney until H.R.S. ("the state agency") "determines that there is reason to suspect fraud." This totally emasculates the authority of the State Attorney to conduct investigations in circumstances where a H.R.S. worker is suspected of fabricating or manipulating a recipient's file so that food stamps are overissued or issued to a fictitious recipient--with the H.R.S. worker obtaining a pecuniary benefit therefrom. To the degree that H.R.S. workers are corrupt,[1] there would never be a determination by H.R.S. that fraud is suspected in a file. Furthermore, all state food stamp agencies are not necessarily of the magnitude and sophistication of H.R.S. There may be state food stamp agencies that lack the expertise or resources for the specialization requisite to making a determination that there is a reasonable suspicion of fraud in a recipient's file.

A fortiori, petitioners hope that the rendering of the primary prosecutorial agency, constitutionally authorized by the State of Florida, totally subservient in its functions to a H.R.S. worker would offend this Court's sensible concepts regarding federal-state comity and the integrity of a prosecutorial authority. It is very, very doubtful that federal legislation or regulations could have ever intended such a total denuding of prosecutorial authority.

That in front of the 92nd Congress in February, 1972[2], an H.E.W. employee spoke of limited access to files in the Aid to Families with Dependent Children Program should not be seized to destroy the authority of the State Attorney's Office to inquire into the area of food stamps in which there is suspected heavy concentrations of fraudulent activity. The authority of each State Attorney's Office

in Florida is quite broad, and, certainly, information coming to the attention of such an Office that the fraud rate among food stamp recipients is likely as high as 40% should not go unheeded. That such a level of fraud may indicate H.R.S. worker complicity and a probable enormous drain on the public purse at a time when the austerity of the economy otherwise constrains the public purse and simultaneously increases the needs of low-income families has enormous implications for public policy.

Roberts v. Austin, Id. at 1213, App. 35 uses the terminology "fishing expedition" and cites Congressional language disapproving of the harrassment of applicants in the verification process of the state food stamp agency. Petitioners wholeheartedly agree that no one should be harrassed, nor should any blind fishing expeditions be allowed. Harrassment and

fishing expeditions, however, end where the legitimate authority of law enforcement begins. A potential fraud rate of forty percent (40%) in an area justifies law enforcement's increased surveillance of that area. As in automobile stops by the police, See United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the actions of the State Attorney's Office were directed to a particular circumscribed area where criminal activity was suspected to exist, and it was not arbitrarily directed at selected recipients. Instead, the inquiry was directed at a category of recipients bearing a rational nexus to the legitimate functions of law enforcement.

Indeed, any supposed intrusion by the State Attorney into any privacy of recipients was de minimus. It was "no more intrusive . . . than typical verification procedures used by banks in approving loan

applicants or employers in considering job applicants." Roberts v. Austin, Id. at 1214, App. 41 (Judge Hill, concurring specially). Most of this same type of information could have been gleaned by police officers conducting a loose surveillance in the recipients' neighborhood and area of employment. The files were being transferred from one State agency (H.R.S.) to another state agency (State Attorney's Office). It was, in essence, a transfer of public documents. See also Davis v. United States, 328 U.S. 580 (1946) (access of officers to public documents). And, the State Attorney, an elected official constitutionally empowered by Florida to enforce the laws of Florida, see Eagan v. Demanio, 294 So.2d 639, certainly should have as much access to recipients' files in these circumstances as an auditor, see 7 U.S.C. §2020(a); 7 C.F.R. §272.1 (f), or a part-time worker of H.R.S., see 7 C.F.R. §272.4 (e).

If the gulf between what the regulations say and what respondent-plaintiffs would like them to say is perceived by this Court as logically traversible so as to prohibit the access of the State Attorney's Office to the files in its inquiry, then petitioners submit that those regulations are incompatible with the ultimate purpose of the Food Stamp Act, that is, to provide nutrition for the truly needy, see 7 U.S.C. §§ 2011, 2014 (a). The State Attorney's inquiry was successful in ferreting out fraud. As such, the regulations would be contrary to the enabling legislation, 7 U.S.C. § 2013, which authorizes regulations necessary or appropriate for the effective and efficient administration of the program. See, e.g., N.Y. State Department of Social Services v. Dublino, 413 U.S. 405, 419-20 (1973) (statute to be interpreted so as to not prohibit States' efforts toward statutory purpose).

The purpose of the Food Stamp Act cannot be promoted where existing techniques to ferret out fraud allow a fraud rate as high as forty percent (40%). Any regulations that perpetuate rampant fraud by stifling otherwise legitimate attempts to probe it should be struck down.

Petitioners, however, suggest that the regulations need not be struck down in that, contrary to Roberts v. Austin, 632 F.2d 1202, App. 1, they should not stifle the State Attorney's attempts to probe areas of suspected food stamp fraud. The regulations do not prohibit such attempts.

Petitioners arguments, of course, are not tantamount to suggesting that the authority of the State Attorney's Office is not without its parameters. As argued above, the State Attorney should not be free to arbitrarily select recipients' files to harrass recipients. If this Court interprets the regulations to further

impose disclosure restrictions on the State Attorney's Office, then more precise parameters of State Attorney access should be determined. The arguable alternatives range from the most liberal, unlimited access, to the most restrictive, access only when referred a file by H.R.S. upon the determination of H.R.S. that a reasonable suspicion of fraud exists [expressly "encouraged" not restricted in 7 C.F.R. 273.16 (e)(2)]. The Fifth Circuit has opted for the latter, the most restrictive alternative. Yet there remains no clear nexus between the regulations and this stifling restrictive interpretation. Quite to the contrary, as argued supra, public policy overwhelmingly favors an interpretation that allows for State Attorney access outside of any H.R.S. determination. A more reasonable interpretation, for example, might track Branzburg v. Hayes, 408 U.S. 665, 699-701 (1972), and thereby

impose the prerequisite that there be a nexus between a "general problem area" within the purview of the State Attorney's Office and the files sought, see 7 U.S.C. §2020 (e)(8). Here, the perusal of files in an area where the fraud rate was said to be as high as forty percent (40%), thereby constituting potential violations of Section 409.325, Florida Statutes, certainly justified the attempts of the State Attorney's Office to determine "whether a crime has been committed and who committed it," Branzburg v. Hayes, Id. at 701.

In sum, respondent-plaintiffs take an "encouraging" regulation and attempt to make it "restricting," take a regulation designed to assure at least one means of investigating food stamp fraud and attempt to make it exclusive, take regulations targeted at the interview of food stamp applicants and the verification process within the food stamp state agency and

attempt to broaden them beyond belief, and take A.F.D.C. provisions and attempt to twist them into an interpretation that restricts the access of the State Attorney's Office to the records of H.R.S., a state agency. Although there should be reasonable limitations on the State Attorney's functions, these incredibly strained interpretations make a mockery of federal-state comity and the legitimate authority of the State Attorney's Office. The State Attorney's Office by inquiring into a general problem area of legitimate concern, potential violations of Section 409.325, Florida Statutes, is not only promoting Florida policy, but also a federal policy that the truly needy, not thieves, have food stamp funds available to them.

Petitioners, therefore, pray that this Court grant this petition so that the State Attorney's Office may be freed from the injunction, do its job, and thereby assist in salvaging the Food Stamp Program.

FOOTNOTES

1. This is not to suggest that corruption in HRS is currently rampant. But that there has been HRS worker prosecution in Duval County does suggest the need for the State Attorney to have this authority.

2. This is cited in Roberts v. Austin, 632 F.2d at 1211, App. 28, as "Establishing Priorties among Programs Aiding the Poor," Hearing before the Senate Finance Committee, 92d Cong. Second Sess. at 149 (Feb. 15, 1972).

Alice ROBERTS et al.,
Plaintiffs-Appellants,

v.

Edward T. Austin, individually and in his official capacity as State Attorney Fourth Judicial Circuit, State of Florida et al.,
Defendants-Appellees.

No. 80-5384.

United States Court of Appeals,
Fifth Circuit
Unit B

December 15, 1980.

Mark Greenberg, Jacksonville Area Legal Aid, Inc., Jacksonville, Fla., for plaintiffs-appellants.

Stephen R. White, Asst. State's Atty., Jacksonville, Fla., for Austin, Atwater & Saitta.

Leo Stellwager, Dist. Counsel, Dept. of Health & Rehab. Services, Robert M. Eisenberg, Jacksonville, Fla., for HRS, David Pingree, et al.

Appeal from the United States District

Court for the Middle District of Florida.

Before HILL, KRAVITCH and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

In this case we must interpret the Food Stamp Act, 7 U.S.C. §§ 2011-2027, and the regulations promulgated thereunder, to determine congressional intent concerning both the investigation of food stamp fraud and the confidentiality to be accorded the case files of food stamp recipients.

Appellants, food stamp recipients, appeal a district court order denying a preliminary injunction that would enjoin both the state agency administering the Food Stamp Program in Florida, the Department of Health and Rehabilitative Services (hereinafter HRS), and the State Attorney for Florida's Fourth Judicial Circuit from certain practices claimed to violate appellants' statutory and constitutional rights. The practices sought to be enjoined arise

out of an ongoing investigation of food stamp fraud by the state attorney. The state attorney subpoenaed and secured from HRS the files of all food stamp recipients who received at least $125 per month in food stamps. The state attorney had no reason to believe that any particular recipient engaged in food stamp fraud. In denying the injunction, the trial court found the state attorney, pursuant to 7 C.F.R. § 272.1(c),[1] "directly connected with enforcement of the Food Stamp Program," so that HRS may release any requested files absent such reason to suspect fraud. Further, the trial court found "no protected right of privacy in the information furnished." Our interpretation of the regulations is that they mandate a showing of suspicion of fraud prior to release by HRS of recipient files. The Food Stamp Act also manifests a strong congressional intent to maintain the con-

fidentiality of recipient files. In accordance with this interpretation, we find that the proposed preliminary injunction satisfied the established requirements for granting an injunction. We therefore hold that the trial court abused its discretion, and we reverse the denial.

FACTS

Appellants, (hereinafter recipients) and members of the class they seek to represent, are "low-income individuals who reside in the three-county area of the Fourth Judicial Circuit, and who participate in the Food Stamp Program in Florida. In early 1979, there were 3,117 individuals participating in the Food Stamp Program in Nassau County, 2,604 in Clay County, and 59,647 in Duval County. Recipient households participating in the Food Stamp Program receive monthly coupon allotments which may be used to purchase certain grocery items. Congress created the Food

Stamp Program to alleviate hunger and malnutrition among the nation's low-income households. 7 U.S.C. §2011.[2] The Food Stamp Program is a cooperative endeavor between federal and state governments. The federal government provides the entire value of the food stamp coupons to state agencies, along with fifty percent or more of all administrative funds for program operation. The state agencies (HRS in Florida) agree to administer the program in accordance with the Food Stamp Act, and the regulations promulgated thereunder. 7 U.S.C. §2020.[3]

Income, expenses, and assets of applicant households determine eligibility for food stamps. Household income and expenses fix monthly household coupon allotments. HRS, through local food stamp offices, receives and acts upon applications from households seeking food stamps. For each applicant household HRS maintains an in-

dividual case file containing information provided to the food stamp office by the household and a case record of participation in the program.

Appellee, Austin, is the State Attorney for the Fourth Judicial Circuit. The Office of State Attorney is a constitutional office created by Article 5, § 17 of the Florida Constitution. The state attorney, as the prosecuting attorney in each judicial circuit, is responsible for the prosecution of public assistance fraud, which is a state criminal offense pursuant to Fla. Stat. Ann. § 409.325.

In February of 1979, the State Attorney for the Fourth Judicial Circuit initiated an investigation of food stamp recipients in Nassau County, Florida. Assistant state attorneys went to the Nassau County Food Stamp Office and requested the food stamp case files of all persons in the county who were receiving a monthly food stamp coupon

allotment of $125 per month or more. The state attorney made this request without any lawful process, subpoena or warrant. The case files requested for investigation were chosen solely because the affected households received food stamp allotments of $125 a month or more. No official of HRS, and no representative of the state attorney, had any reason to suspect that particular members of the affected households had engaged in public assistance fraud.

The supervisor of the Nassau County Food Stamp Office gave all requested files to the state attorney. Subsequently, HRS requested to be served with a subpoena for the files already reviewed by the state attorney and for any future files. The state attorney complied, and served a subpoena mandating the production of "any and all applications, records, worksheets, or any other pertinent information pertain-

ing to any Nassau County food stamp recipient." After HRS released the case files, the state attorney reviewed the files and filled out information sheets for all affected households, recording each household's source and amount of income, resources, household composition, medical expenses, rent or mortgage amounts, utility costs, child support or alimony.

These information sheets were distributed to local police personnel. The state attorney advised the police to conduct a criminal investigation and verify, through standard criminal investigative techniques, the information collected on these forms. The state attorney asked the police to contact neighbors, employers, and others who might be familiar with the household's circumstances to verify the information previously provided to the Food Stamp Program. The state attorney also instructed the police not to disclose

unnecessarily any of the information obtained.

Over the next six months, an estimated 500 households in Nassau County were subjected to criminal investigations. The local police compared the information obtained in the community with that which applicants previously gave to the food stamp office. The sole basis for investigative targets was the amount of food stamps received.

During the summer of 1979, the state attorney initiated a substantially similar investigation in Clay County. Without requiring any showing or reason to suspect fraud, HRS again turned over hundreds of case files. In turn, the state attorney disseminated this information to local police for verification through criminal investigation.

It remains the position of HRS that so long as the state attorney provides a

subpoena, HRS officials will release any and all requested case files without regard to whether there is any basis to suspect affected households of fraud.

In district court, recipients asserted that HRS's release of all requested food stamp case files to the state attorney without any reason to suspect individuals of fraud violated the statutory rights of recipients. Recipients base this statutory claim on the Food Stamp Act and the regulations promulgated thereunder. They assert that the regulations prohibit HRS from releasing file information to the state attorney unless there is some reason to suspect fraud, notwithstanding that the state attorney may be "directly connected" with the enforcement of the Act, within the meaning of 7 C.F.R. § 272.1(c). Recipients also claimed violation of their constitutional rights to privacy, to freedom from unreasonable search and seizure, and to due

process. Recipients sought damages arising from the release of the information and investigative activities that have occurred. Furthermore, recipients sought declaratory and injunctive relief to prevent HRS from releasing case files without any basis to suspect individuals of fraud, and to prevent the state attorney from demanding access to food stamp case files in the absence of a proper referral of the case by HRS, or absent a search warrant.

The state attorney justified access to the food stamp files on the basis of the general investigative power of the office and because the office of state attorney is "directly connected" with the enforcement of the Act, pursuant to 7 C.F.R. 272.1(c).

The trial court, following a hearing and a finding of jurisdiction pursuant to 28 U.S.C. § 1337, denied recipients' motion for preliminary injunction. The trial

court concluded that recipients were not substantially likely to prevail on their claim of violation of the Food Stamp Act and its regulations, and that they were not substantially likely to prevail on their claim of deprivation of constitutional rights. The trial court addressed the regulatory question first and concluded that because the state attorney is, pursuant to 7 C.F.R. § 272.1(c), "directly connected" with enforcement of the Food Stamp Act, HRS may release recipient files to him without regard to whether the recipients are suspected of committing fraud. The trial court obviously determined that such a conclusion was mandated by several factors, the most critical factor being the language contained in the Florida Food Stamp Application Form. That language states: "I authorize Division of Family Services and the Division of Public Assistance Fraud to verify any information given

herein and to make any inquiry of past or present employers and records and financial or otherwise." Further, such language complies with Fla. Stat. Ann. 11.50(b). Additionally, the trial court noted that Fla. Stat. Ann. 409.355 makes public both the names of recipients of public assistance and the amount of assistance received. Finally, the trial court found that regulatory references, most notably 7 C.F.R § 273.16(e)(2),[4] "encouraging the referral of suspected fraud cases to the State Attorney do not require the conclusion that the State Attorney may not act other than in referred cases."

As to the constitutional question, the trial court found that the Food Stamp Act provided certain protections for recipients' privacy, and following Plante v. Gonzales, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979), balanced these

privacy protections against the governmental interest in having unimpeded access to the files. The trial court determined that:

> there is a substantial governmental and public interest in the restricted disclosure of this information. The term restricted is used because there is no suggestion or contention that there is either desire or intention to make this information general public information or to extend its use or disclosure to other than those 'directly connected' with and who therefore have a legitimate official interest in its use. The governmental and public interest in such restricted disclosure is served in this use because fraud in the program is thereby curtailed, benefits are limited to those for whom they were intended and the public perception of the Food Stamp Program as a whole is changed from one described derisively as having recipients driving up in late model Cadillacs to pick up their food stamps to one recognized for serving the laudible purpose for which it was created. That there are instances of fraud should come as no surprise to anyone, but certainly the program should not be permitted to be publicly typified by those who abuse it. To this extent the government and the public have a vital interest in ferreting out those who do abuse the program and without access to the applications and reports, effective detection of fraud would be virtually impossible.

The trial court concluded that because

recipients "had no protected privacy right in the information furnished," recipients would not face irreparable harm from HRS's planned release of information or from the state attorney's criminal investigations.

ISSUES

Recipients ask us to determine:

1. whether the trial court erred in finding that the state attorney can subpoena and secure records of food stamp recipients, where the affected recipients are not suspected of fraud, because the state attorney is "directly connected" with the enforcement of the Food Stamp Program; and,

2. whether the trial court erred in holding that HRS's release of recipients' case files to the state attorney without reason to suspect fraud did not violate the recipients' constitutinal right to privacy.

STANDARD OF REVIEW

As we recently stated in Shamloo v. Miss. State Bd. of Trustees, Etc. 620 F.2d 516, 524 (5th Cir. 1980):

> This court clearly established the requirements for granting a preliminary injunction in Canal Authority of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974) as follows:
>
> ... (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threa tened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Id. at 572. The grant or denial of a preliminary injunction rests in the discretion of the district court. Johnson v. Radford, 499 F.2d 115 (5th Cir. 1971). We must determine whether the district court abused its discretion as bounded by the

four prerequisites of Canal Authority. Farshy v. Kagan, 585 F.2d 749 (5th Cir. 1978).

The above four requirements considered by the trial court are mixed questions of law and fact and "[o]n review the district court's findings of fact are to be upheld unless 'clearly erroneous.' Fed.R.Civ.P. 52(a). The district court's conclusions of law [however] are subject to broad review and will be reversed if incorrect." Buchanan v. United States Postal Service, 508 F.2d 259, 267 n. 24 (5th Cir. 1975).

DISCUSSION

I. The Regulatory Claim

A. Congressional Intent

[1] Resolution of this issue turns upon our construction of the Food Stamp Act and the regulations thereunder. As noted by the Supreme Court, "our task is to interpret the words of these statutes [and

regulations] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979).

The trial court found "that the State Attorney is within that category of persons 'directly connected' with the enforcement of the Food Stamp Act and is entitled to access to the recipient files for use in the enforcement of the Act." The trial court interpreted a finding of "directly connected" to be a finding of a right to complete access to recipient files. Such an interpretation ignores the possibility that those "directly connected" with the administration or enforcement of the Act might be restricted in their use and dis closure of program information. We reject the trial court's approach as too limited when the entire Act and regulatory structure is considered.

When a household applies for food stamps, the completed application contains a large amount of personal information concerning the household's circumstances. This information is reviewed by the food stamp certification caseworker, in an "official and confidential discussion of household circumstances," with the applicant's "right of privacy" protected during this interview. 7 C.F.R. § 273.2(e).[5]

Verification is the process of confirming the household statement about factors of eligibility through either documentary sources, collateral (third-party) contacts, or a home visit. The areas of verification and the means of verification are not left to the discretion of the certification worker. Pursuant to 7 C.F.R. § 273.2(f),[6] in the absence of consent from the household, a certification worker is not free to verify any factor of eligibility or to make contacts with third

persons in order to verify information provided by the household.

The federal regulations governing verification expressly distinguish between factors of eligibility for which verification is mandatory (gross non-exempt income, alien status, utility and medical expenses), and all other factors of eligibility. For non-mandatory factors, the state agency, here HRS, can only require verification if the household's assertions are "questionable." 7 C.F.R. § 273.2(f)(1) and (2).[7] Thus, if the caseworker has no reason to believe that the household's assertions are questionable regarding a non-mandatory factor, household composition for example, the caseworker cannot require verification of this factor. 7 C.F.R. § 273.2(f)(2) and (i).[8]

Where verification is allowed or required, the nature of verification is not left to caseworker discretion. The primary

source of verification is documentary evidence provided by the household. 7 C.F.R. § 273.2 (f)(4).[9] If the household is unable to provide acceptable documentary verification, the caseworker may make use of a collateral contact. The caseworker, however, is first required to ask the household to name and agree to a mutually acceptable collateral contact. 7 C.F.R. § 273.2(f)(5).[10] If the household unreasonably refuses to provide acceptable collateral contact verification, the application can be rejected, or the case terminated. The caseworker, however, cannot proceed to contact a third party for verification without the permission of the household. We base this view of 7 C.F.R. § 273.2(b)(5) on the Department of Agriculture comments that accompanied promulgation of this section. Many commentors recommend that the regulations prohibit the use of a collateral contact

without the express written consent of the household. Since the proposed regulations clearly state that the state agency must rely on the household to provide the name of a collateral contact, the Department believes the recommended change is unnecessary. 43. Fed. Reg. 47856, (Tuesday, October 17, 1978).

When a collateral contact is necessary, the regulations establish a balance between the state agency's right to ensure that only eligible persons receive food stamps and the household's right to maintain its privacy and dignity. Congress recently expressed its awareness of this dilemma and emphasized the need to ensure protection of recipient privacy rights.

The legal barriers that need to be lowered, or in some instances withdrawn entirely, are substantial, appropriately so in light of the privacy considerations involved and the danger of abuse of con-

fidential information for illegitimate purposes by both federal and state food stamp personnel. The Program need for certain information is great, but it must be carefully balanced by the need to protect needy individuals from having their privacy bartered away in order to assuage their hunger. Existing protections should not be reduced without careful consideration and without the substitute of other meaningful safeguards. The committee's bill attempts to achieve this balanced approach to disclosure of relevant wage and benefit information. H.R. Rep. 96-788, Food Stamp Act Amendments of 1980, at 106.

The balance between the household's privacy rights and the need to investigate household statements to ensure accuracy shifts after there is reason to suspect the household has provided incorrect information to the Food Stamp Program. This suspicion may arise in a number of ways.

The recipient may submit inconsistent or questionable information during regular redeterminations of eligibility; an informant may provide information which contradicts representations made by the households; regular computer checks of information given to the Aid to Families with Dependent Children program or the Social Security program may reveal inconsistent reporting. At any point when the information provided by the household to the Food Stamp Program appears questionable, the state worker can require an additional document or verification and, if that verification is inadequate, a collateral contact. 7 C.F.R. § 273.2(f). If the information continues to be suspect, or the household refuses to cooperate, a fraud investigation may be appropriate.

The regulations authorize referral to state prosecuting authorities in cases where individuals are suspected of commit-

ting fraud. 7 C.F.R § 273.16(e)(2).[11] This regulation is the sole reference in the Food Stamp Act and regulations providing a case file to a state prosecutor; and 7 C.F.R. § 273.16(e)(2) carefully limits referral to "cases where individuals are suspected of committing fraud." The careful limitation on information disclosure throughout the regulatory structure, the qualified language of 7 C.F.R. § 273.16 (e)(2), and the absence of any reference to providing case files to prosecuting authorities anywhere else in the regulatory structure, leads to the conclusion that the state agency cannot release a file to a prosecutor until the agency determines there is reason to suspect fraud. Further we find it relevant that § 273.16(e)(2) encourages referral only for "prosecution," not investigation. This is not to say, of course, that, upon referral, the state attorney cannot make use of certain

investigative tools, like the grand jury.

Clearly, Congress intended to establish a structure where the state agency can contact third persons to verify information, and engage in investigations, only after the household has provided questionable information. After establishing such a careful structure, Congress did not intend that it be circumvented by allowing the agency to turn over the files to the prosecutor for criminal investigation at any time, without regard to whether the household has engaged in questionable behavior. Given this regulatory structure, and the clear intent of Congress, we must disagree with the trial court, since it effectively held that by the simple expedient of turning over all case files to a state attorney, HRS may accomplish indirectly the verification which it is barred from doing by the federal food stamp regulations.

In resolving any ambiguity in the regulatory structure at the Food Stamp Program, it is useful to examine the Department of Health and Human Resources' interpretation of the substanitally similar "use or disclosure" provision of the Aid to Families with Dependent Children Program, 42 U.S.C. §§ 601-662. Health and Human Resources, in administering the AFDC program, has interpreted its "use or disclosure" provision in a manner which clearly forbids the indiscriminate release of case files by a state agency to a state prosecutor without any basis to suspect fraud. Health and Human Resources advised Congress that:

> although a well-run state welfare program could turn up most cases of welfare fraud, it is not possible for the state or local welfare agency to identify all such cases. Where law enforcement officials identify a case of suspected welfare fraud which has gone undetected by the welfare agency and wish to take action there is no federal statutory provision or HEW [HHR] regulation which prevents a statewide welfare agency from disclos-

> ing information bearing on the question of welfare fraud to those officials. Disclosure of information unrelated to the suspected fraudulent conduct is, of course, both unnecessary and undesirable, and the welfare agency therefore has the responsibility to make available from the case file only such information as is needed for the investigation of the fraudulent activity in question. Also, it would be administratively disruptive and a violation of the legislatively mandated principle of confidentiality to permit unlimited access to all case files when the law enforcement officials have no specific instance of welfare fraud in mind, but merely suspect that such fraud exists generally in the program.

"Establishing Priorities among Programs Aiding the Poor," Hearing before the Senate Finance Committee, 92d Cong. Second Sess. at 149 (Feb. 15, 1972).

It is also worth noting that 45 C.F.R. § 235.110, the Health and Human Resources equivalent of Agriculture's 7 C.F.R. § 273.16(e), provides for referral to law enforcement officials in situations "in which there is valid reason to suspect that fraud has been practiced." In United States

v. McDaniels, 370 F.Supp. 293 (E.D.La. 1973), the court interpreted this provision as barring referral of a case file when there is no basis to suspect fraud. There, the court stated that:

> The HEW Regulations with respect to suspected fraud contemplated some preliminary investigation by the agency before a case is turned over to a law enforcement officer. Each state plan must provide methods and criteria for identifying situations in which a question of fraud may exist. That procedure must be developed for referral to law enforcement officers of "situations in which there is valid reason to suspect that fraud has been practiced" implies that cases where "valid reason" does not exist will not be referred. This conclusion is buttressed by the express provision that the state agency plan (not its law enforcement program) must provide "For methods of investigation of situations in which there is a question of fraud . . . ."

370 F.Supp. at 296.

This prohibition on blanket release of files by the state agency, which exists in the AFDC Program, is precisely what HRS denies exist in the Food Stamp Program. There is no reason, however, to believe

that Congress intended any less protection for the low-income households who receive federal food assistance than for the low-income households who receive federal financial assistance. Indeed, millions of households receive both food stamps and AFDC benefits, and pursuant to 7 C.F.R. § 273.2(j),[12] state agencies are required to develop procedures for a single application and interview when a household is eligible for both programs. Much of the information regarding household income resources, and composition is necessary for both eligibility determinations. It is inconsistent to say that Congress intended to bar the state agency administering the AFDC Program from giving a prosecuting authority the AFDC file without valid reason to suspect fraud, but intended to allow the state agency to turn over the food stamp file without restriction. We need not interpret either of the regulations in a

manner which results in the same congressional language leading to inconsistent protections. Accordingly, we find that Congress intended the state agency administering the Food Stamp Program to turn over case files to a state prosecutor only when there is valid reason to suspect fraud in the particular household.

Contrary to the trial court's holding, a finding that the state attorney is "directly connected" with the enforcement of the Food Stamp Act does not compel the conclusion that HRS may release all files of all persons receiving food stamps to that state prosecutor. The state attorney contends he gets his power to investigate because he is, pursuant to 7 C.F.R. § 272.1(c), "directly connected" with the enforcement of the Act; the state attorney then disassociates himself from the other regulations limiting investigative authority. If the state attorney is

"directly connected" with enforcement of the Act, then he is also bound by those provisions restricting his authority to investigate.

The trial court, in concluding that HRS could refer case files to the state attorney for investigation of their eligibility, expressly relied upon aspects of state law and practice. The trial court relied upon a waiver provision of Florida's food stamp application. It also relied upon Fla. Stat. Ann. § 409.355 which provides, in part, that "the lists of names of all persons who have received public assistance payments and the amount of such payments are a matter of public record."

Federal regulations clearly prohibit HRS from requiring verification of a number of factors of eligibility when the applicant has not provided "questionable" information. 7 C.F.R. § 273.2(f)(1),(2). Federal regulations prohibit the require-

ment of collateral contacts when documentary verification is adequate, and prohibit the state agency from engaging in collateral contacts absent the household's consent. 7 C.F.R. § 273.2 (f)(4),(5).

This limitation on agency discretion and the verification process demonstrates an awareness by Congress and the Department of Agriculture that, absent carefully structured limits on the state agency's ability to verify, the verification process can be used to harass or delay eligibility determinations for applicant households. The Food Stamp Amendments of 1980 broadened the rights of state agencies to verify information provided by "error-prone" households. In developing a model by which those households which are more subject to error are also subject to increased verification, Congress expressly rejected the option of allowing states to verify any factors of eligibility for any or all

households. In rejecting this option, the House Agriculture Committee noted "the carefully maintained balance between verification that reduces costly program error and verification that harasses applicants and prevents participation without impacting on error. . ." H.R. Rep. 96-788, Food Stamp Amendments of 1980, at 98.

The Food Stamp Act also expressly prohibits a state agency participating in the Food Stamp Program from levying additional eligibility requirements for applicant households. 7 U.S.C. § 2020(e)(5).[13] Additionally, the Food Stamp Act expressly requires the state agency to undertake certification of applicant households in accordance with the procedures prescribed in the federal regulations. 7 U.S.C. § 2020(e)(6).[14]

It is not necessary for us to resolve whether Florida law and practice conflict with federal law. The question of the

constitutionality of Florida law and practice is not specifically before us. Our only necessary task is to interpret the Act and accompanying regulations in view of the purposes Congress sought to serve. This we have done. We do note that a court does not give intent to congressional purpose by reference to state law and practice.

Our interpretation of the Act and regulations results in a finding that HRS cannot release files to a state prosecutor in the absence of a basis to suspect fraud. Such an interpretation in no way impedes the state attorney, a constitutionally authorized body, from investigating fraud. Our interpretation merely prohibits the state attorney from conducting a fishing expedition in food stamp files. Whenever the state attorney has reasonable suspicion to suspect fraud in a particular case file, he may request that file and conduct a

normal fraud investigation. The state attorney may also conduct normal fraud investigations of "those individuals suspected of committing fraud," referred to the state attorney by HRS, pursuant to 7 C.F.R. § 273.16(e)(2).

Accordingly, there is a substantial likelihood that recipients will prevail on the merits of their regulatory claim. Further, the injunction will not harm either HRS or the state attorney. Nor will the injunction be adverse to the public interest. The injunction will not alter the normal process of investigation and prosecution of food stamp fraud.

B. Irreparable Harm [2] As mentioned, the trial court determined "from the language of 7 C.F.R. § 272.1(c), that the legislature intended to provide some degree of confidentiality of the personal information of the food stamp recipients by preventing general public disclosure or

disclosure to persons not directly connected with the program.

We agree with the trial court that the Act and accompanying regulations give recipients statutory protection from disclosure of confidential information. As such, recipients possess a legitimate expectation that the information will be kept confidential. Certainly, recipients do not legitimately expect local police officers to peruse their food stamp files. This court has held that "[w]hen a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally, as discussed above, and at common law." Plante v. Gonzalez, 575 F.2d 1119, 1135 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979).

The trial court, therefore, erred in finding no irreparable harm.

II. The Constitutional Claim

Recipients assert that HRS's release of their food stamp files to the state attorney without reason to suspect fraud violated their constitutional right to privacy.

This court has a policy of deciding cases on the narrowest legal grounds available. Shamloo v. Miss. State Bd. of Trustees, Etc., 620 F.2d 516 (5th Cir. 1980); Penthouse International Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980). This policy is particularly applicable where, as here, constitutional questions are involved. As Justice Frankfurter wrote, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality

unless such adjudication is unavoidable." Spector Motor Service v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944).

In this case, recipients seek reversal of a denial of a motion for preliminary injunction. Our holding concerning recipients' regulatory claim is sufficient to reverse the denial. Consequently, we need not decide the constitutional claim.

CONCLUSION

[3] The trial court abused its discretion in denying the preliminary injunction. There is a substantial likelihood that recipients will prevail on the merits. Based on Plante v. Gonzalez, recipients have suffered irreparable injury and will continue to suffer injury unless the injunction is granted. Granting the injunction will not be adverse to the public interest; nor will granting the

injunction harm either HRS or the state attorney.

Accordingly, the trial court's order denying the preliminary injunction is vacated, the judgement is reversed, and the cause is remanded to grant a preliminary injunction, consistent with this opinion, enjoining HRS from releasing food stamp files to the state attorney absent any basis to suspect that the affected households have committed fraud.

REVERSED AND REMANDED.

JAMES C. HILL, Circuit Judge, concurring specially:

I concur specially in the result reached by the majority but wish to point out several troublesome aspects of the case and the majority's handling of it. The appellees have argued persuasively that there is a need to verify information supplied by food stamp recipients to

program administrators in Florida by suggesting in their brief that fraud may be involved in as many as 40 percent of all food stamp cases. The type of verification that appellees sought to conduct was fairly standard; ostensibly, it was no more intrusive or violative of privacy than typical verification procedures used by banks in approving loan applicants or employers in considering job applicants. While such a procedure might reveal fraud, or even deter fraud, I would not conclude, as does the majority, that the households whose entitlements were being verified "were subjected to criminal investigation," ante, at 1205, 1206.

Although it would seem that a verification procedure such as that urged by appellees would ultimately benefit those persons truly in need of food stamps and legally entitled to them,[1] it is clear that the desirability of such a procedure is not

an issue for our determination. Our function is to determine whether, under the laws passed by Congress and under the regulations properly promulgated by the various administrative agencies, this type of verification procedure can be undertaken. I conclude, along with the majority, see ante, 1208-1211, that Congress through the Food Stamp Act, 7 U.S.C. §§ 2011-2027 (1976), and the Department of Agriculture though its regulations, e.g. 7 C.F.R. § 272 (1979), have precluded the action that appellees seek to take.

The results reported to us at oral arguments, see note 1 supra, suggest that further study of the legislative policy involved in this case is warranted. But if another course is to be chosen, the fine men and women who have been elected to represent the people are quite competent to the task. The judiciary should neither assume the responsibility nor usurp au-

thority not delegated to it. See Wilson v. First Houston Investment Corp., 566 F.2d 1235, 1244 (5th Cir. 1978) (Hill, J. dissenting).

FOOTNOTES

1. 7 C.F.R. 272.1(c) provides:

(c) Disclosure. (1) Use or disclosure of information obtained from food stamp applicant households, exclusively for the Food Stamp Program, shall be restricted to persons directly connected with the administration or enforcement of the provisions of the Food Stamp Act or regulations, or the Food Distribution Programs as defined in Part 283 of this Subchapter, or with other Federal or Federally aided, means-tested assistance programs such as Title IV-A (AFDC), XIX (Medicaid), or XVI (SSI), or with general assistance programs that are subject to the joint processing requirements specified in § 273.2(j)(2). [Emphasis added.]

(2) If there is a written request by a responsible member of the household, its currently authorized representative, or a person acting on its behalf to review material and information contained in its casefile, the material and information contained in the casefile shall be made available for inspection during normal business hours. However, the State agency may withhold confidential information, such as the names of individuals who have disclosed information about the household with the household's knowledge, or the nature or status of pending criminal prosecutions. [Emphasis added.]

2. 7 U.S.C. § 2011 provides:

It is hereby declared to be the policy of Congress, in order to promote the

general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.

3. 7 U.S.C. § 2020 provides, in pertinent part:

(a) The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons and the control and accountability thereof. There shall be kept such records as may be necessary to ascertain whether the program is being conducted in compliance with the provisions of this Act and the regulations issued pursuant to this Act. Such records shall be available for inspection and audit at any reasonable time and shall be preserved for such period of time not less than three years, as may be specified in the regulations issued pursuant to this Act.

* * *

(d) The State agency (as defined in section 3(n)(1) of this Act [7 U.S.C. § 2012 (n)(1)]) of each State desiring to participate in the food stamp program shall submit for approval a plan of operation specifying the manner in which such program will be conducted within the State in every political subdivision. . .

(e) The State plan of operation required under subsection (d) of this section shall provide, among such other provisions as may be required by regulation

(3) that the State agency shall thereafter promptly determine the eligibility of each applicant household by way of verification only of income other than that determined to be excluded by section 5(d) of this Act [7 U.S.C. § 2014(d)] and such other eligibility factors as the Secretary determines to be necessary to implement sections 5 and 6 of this Act [7 U.S.C. §§ 2014, 2015], so as to complete certification of and provide an allotment retroactive to the period of application to any eligible household not later than thirty days following its filing of an application;

* * *

(5) the specific standards to be used in determining the eligibility of applicant households which shall be in accordance with sections 5 and 6 of this Act [7 U.S.C §§ 2014, 2015] and shall include no additional requirements imposed by the State agency;

(6) that (A) the State agency shall undertake the certification of applicant households in accordance with the general procedures prescribed by the Secretary in the regulations issued pursuant to this Act;

* * *

(8) safeguards which limit the use or disclosure of information obtained from applicant households to persons directly connected with the administration or enforcement of the provisions of this Act or the regulations issued pursuant to this Act.

(f) To encourage the purchase of nutritious foods, the Secretary shall extend the expanded food and nutrition education program to the greatest extent possible to reach food stamp program participants. The program shall be further supplemented by the development of single concept printed materials, specifically designed for persons with low-reading and comprehension levels, on how to buy and prepare more nutritious and economical meals and on the relationship between food and good health.

(g) If the Secretary determines that in the administration of the food stamp program there is a failure by a State agency to comply with any of the provisions of this Act, the regulations issued pursuant to this Act, or the State plan of operation submitted pursuant to subsection (d) of this section, the Secretary shall immediately inform such State agency of such failure and shall allow the State agency a specified period of time for the correction of such failure. If the State agency does not correct such failure within that specified period, the Secretary may refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance forthwith by the State agency and, upon suit by the Attorney General in an appropriate district court of the United States having jurisdiction of the geographic area in which the State agency is located and a showing that

noncompliance has occurred, appropriate injunctive relief shall issue.

(h) If the Secretary determines that there has been negligence or fraud on the part of the State agency in the certification of applicant households, the State shall, upon request of the Secretary, deposit into the Treasury of the United States, a sum equal to the face value of any coupon or coupons issued as a result of such negligence or fraud.

(i) Notwithstanding any other provision of law, the Secretary and the Secretary of Health, Education, and Welfare shall develop a system by which (1) a single interview shall be conducted to determine eligibility for the food stamp program and the aid to families with dependent children program under part A of title IV of the Social Security Act [42 U.S.C. §§ 601 et. seq.]; (2) households in which all members are recipients of supplemental security income shall be permitted to apply for participation in the food stamp program by executing a simplified affidavit at the social security office and be certified for eligibility utilizing information contained in files of the Social Security Administration; (3) households in which all members are included in a federally aided public assistance or State or local general assistance grant shall have their application for participation in the food stamp program contained in the public assistance or general assistance application form; and (4) new applicants, as well as households which have recently lost or been denied eligilility for public assistance or general assistance, shall be certified for participation in the food stamp program based on information in the public assistance or general assistance case file to

the extent that reasonably verified information is available in such case file.

(j) The Secretary, in conjunction with the Secretary of Health, Education, and Welfare is authorized to prescribe regulations permitting applicants for and recipients of social security benefits to apply for food stamps at social security offices and be certified for food stamps eligibility in such offices in order that the application and certification for food stamp assistance may be accomplished as efficiently and conveniently as possible.

(k) Subject to the approval of the President, post offices in all or part of the State may issue, upon request by the State agency, food stamps to eligible households.

4. 7 C.F.R. 273.16(e)(2) provides:

(e) Court imposed disqualifications.

(2) State agencies are encouraged to refer for prosecution under State or local fraud statutes those individuals suspected of committing fraud, particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one fraudulent act. The State agency shall confer with its legal representative to determine the types of cases which will be accepted for possible prosecution. State agencies shall also encourage State and local prosecutors to recommend to the courts that a disqualification penalty as provided in section 6(b) of the Food Stamp Act be imposed in addition to any other civil or criminal fraud penalties. [Emphasis added.]

5. 7 C.F.R. 273.2(e) provides, in pertinent part:

The interview shall be conducted as an official and confidential discussion of household circumstances. The applicant's right to privacy shall be protected during the interview. Facilities shall be adequate to preserve the privacy and confidentiality of the interview.

6. 7 C.F.R. § 273.2(f) provides, in pertinent part:

(f) Verification. Verification is the use of third-party information or documentation to establish the accuracy of statements on the application.

(1) Mandatory verification. State agencies shall verify the following information prior to certification for households initially applying:

(i) Gross nonexempt income . . .
(ii) Alien status . . .
(iii) Utility expenses . . .
(iv) Medical expenses . . .

7. 7 C.F.R. § 273.2(f)(2) provides, in pertinent part:

(2) Verification of questionable information. With the exception of liquid resources and loans, State agencies shall verify all other factors of eligibility prior to certification only if they are questionable and affect a household's eligibility or benefit level. Procedures for verifying loans and liquid resources are described in paragraph (3) of this section. To be considered questionable, the information on the application must be

inconsistent with statements made by the applicant, inconsistent with other information on the application or previous applications, or inconsistent with information received by the State agency. When determining if information is questionable, the State agency shall base the decision on each household's individual circumstances. A household's report of expenses which exceed its income may be grounds for a determination that further verification is required. However, this circumstance shall not, in and of itself, be grounds for a denial. The State agency shall instead explore with the household how it is managing its finances, whether the household receives excluded income or has resources, and how long the household has managed under these circumstances. Procedures described below shall apply when information concerning one of the following eligibility requirements is questionable: [Emphasis added.]

8. 7 C.F.R. § 273.2(f)(2)(i) provides:

(i) Household composition. If questionable, State agencies shall verify any factors affecting the composition of a household such as household size and boarder status. However, due to the difficulty in verifying whether or not a group of individuals customarily purchases and prepares meals together and, therefore, constitutes a household, State agencies shall generally accept the household's statement regarding food preparation and purchasing. [Emphasis added.]

9. 7 C.F.R. § 273.2(f)(4) provides:

(4) Sources of verification. (i) Documentary evidence. State agencies shall use documentary evidence as the primary source of verification. Documentary evi dence consists of a written confirmation of a household's circumstances. Examples of documentary evidence include wage stubs, rent receipts, and utility bills. Although documentary evidence shall be the primary source of verification, acceptable verification shall not be limited to any single type of document and may be obtained through the household or other source. Whenever documentary evidence cannot be obtained, State agencies shall use alternate sources of verification such as collateral contacts and home visits.

(ii) Collateral contacts. A collateral contact is a verbal confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made either in person or over the telephone. The acceptability of a collateral contact shall not be restricted to a particular individual but may be anyone that can be expected to provide an accurate third-party verification of the household's statements. Examples of acceptable collateral contacts are employers, landlords, social service agencies, migrant service agencies, and neighbors of the household.

(iii) Home visits. Home visits shall be used as verification only if documentary evidence cannot be obtained, and the visit is scheduled in advance with the household.

(iv) Discrepancies. Where information from another source contradicts statements made by the household, the household shall be afforded a reasonable opportunity to

resolve the discrepancy prior to an eligibility determination.

10. 7 C.F.R. § 273.2(f)(5) provides:

(5) Responsibility for obtaining verification. (i) The household has primary responsibility for providing documentary evidence to support its income statements and to resolve any questionable information. Households may supply documentary evidence in person, through the mail, or through an authorized representative. The State agency shall accept any reasonable documentary evidence provided by the household and shall be primarily concerned with how adequately the verification provides the statements on the application. If it would be difficult or impossible for the household to obtain the documentary evidence in a timely manner, the State agency shall offer assistance to the household in obtaining the documentary evidence, except as otherwise stated in this section.

(ii) Whenever documentary evidence cannot be obtained, the State agency shall substitute a collateral contact or a home visit. The State agency shall rely on the household to provide the name of any collateral contact. The household may request assis- tance in designating a collateral contact. The State agency is not required to use a collateral contact designated by the house- hold if the collateral contact cannot be expected to provide an accurate third-party verification. When the collateral contact designated by the household is unacceptable, the State agency shall ask the household to designate another collateral contact. The State agency is responsible for obtaining verification from acceptable collateral contacts.

The State agency shall not require the household to personally present verification at a food stamp office. [Emphasis added.]

11. Refer to n. 4.

12. 7 C.F.R. § 273.2(j) provides, in pertinent part:

(j) PA and GA households. Households in which all members are applying for public assistance (PA) shall be allowed to apply for food stamp benefits at the same time they apply for PA benefits. These households' food stamp eligibility and benefit levels shall be based solely on food stamp eligibility criteria, and the households shall be certified in accordance with the notice, procedural and timeliness requirements of the food stamp regulations. Households in which all members are applying for State agency administered general assistance (GA) shall, at a minimum, be provided with applications for food stamp benefits and be referred to the appropriate food stamp office for an eligibility determination. Under certain circumstances, these households may be able to apply jointly for their GA and food stamp benefits.

(1) PA households. (i) The application for AFDC or other public assistance shall contain all information necessary to determine a household's food stamp eligibility and level of benefits. Information relevant only to food stamp eligibility shall be contained in the PA form or shall be an attachment to it. The PA application shall have a place for the household to indicate if it does not wish to apply for food stamps.

* * *

Refer also to n. 3, 7 U.S.C. § 2020(i).

13. 7 U.S.C. § 2020(e)(5) provides:

(5) the specific standards to be used in determining the eligibility of applicant households which shall be in accordance with sections 5 and 6 of this Act [7 U.S.C. §§ 2014, 2015] and shall include no additional requirements imposed by the State agency.

14. 7 U.S.C. § 2020(e)(6) provides, in pertinent part:

(6) that (A) the State agency shall undertake the certification of applicant households in accordance with the general procedures prescribed by the Secretary in the regulations issued pursuant to this Act.

Concurring Opinion

1. We were advised at oral argument that in one county involved verification procedures were conducted in a total of 350 cases. Of those, 61 arrests for fraud in procurement of food stamps resulted. The conviction rate was said to be approximately 90-91 percent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALICE ROBERTS, MARY JO ROBERTS, CLARA LEE LONDON, JANE DOE, and all other persons similarly situated,

Plaintiffs,

vs.

Case No. 80-183-Civ-J-WC

EDWARD T. AUSTIN, etc., et al.,

Defendants.

O R D E R

This cause having been argued before the Court upon Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, the Court finds that Plaintiffs have not demonstrated the existence of either a reasonable expectation of privacy or of a constitutional right of privacy by the Plaintiffs in their food stamp application forms or case files in the possession of the Department of Health and Rehabilitative Services; the Court further

finds that Plaintiffs have not demonstrated that denial of such Motion would occasion any immediate and irreparable injury to the Plaintiffs. Absent demonstration of a likelihood of success and of the threat of immediate and irreparable injury, the Motion should be denied. Holiday Inns of America, Inc. v. B & B Corporation, 409 F. 2d 614 (3rd 1969). It is hereupon,

ORDERED:

1. That Plaintiffs Motion for Temporary Restraining Order is denied.

2. Hearing on Plaintiffs' Motion for Preliminary Injunction is hereby set for March 14, 1980 at 2:00 o'clock P.M. Plaintiffs shall serve and file all additional papers and affidavits upon which Plaintiffs intend to rely not later than March 6, 1980. Defendants shall file and serve all counter or opposing affidavits together with a responsive memorandum brief not later than Thursday, March 13, 1980.

DONE AND ORDERED at Jacksonville, Florida this 3rd day of March, 1980.

/s/William Castagna
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALICE ROBERTS, MARY JO ROBERTS, CLARA LEE LONDON, JANE DOE and all other persons similarly situated,

Plaintiffs,

vs.

EDWARD T. AUSTIN, et al.,

Defendants.

CASE NO. 80-183-Civ-J-WC

O R D E R

Plaintiffs, pursuant to Rule 65, F.R.Civ.P. and Local Rule 4.06 have petitioned this Court to enter a preliminary injunction against certain Defendant officials of both the State Attorney's Office for the Fourth Judicial Circuit and the Florida Department of Health and Rehabilitative Service (DHRS). The Plaintiffs have previously sought a Temporary Restraining Order which was denied by this Court on March 3, 1980. A

hearing on Plaintiffs' request for a preliminary injunction was held on March 28, 1980.

28 U.S.C §1337 provides a jurisdictional basis for this action. Section 1337(a) grants original jurisdiction to the district courts "of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ." One of the articulated purposes of the Food Stamp Act is to "strengthen our agricultural economy," as well as to produce a more orderly marketing and distribution of food," 7 U.S.C. § 2011. Thus, it is clear that this action arises out of an Act of Congress which regulates commerce.

This request arises from an ongoing investigation of food stamp recipients, some of whom are present Plaintiffs, by the Office of the State Attorney. This investigation has been conducted in Nassau

and Clay Counties by the State Attorney's Office initially by requesting and receiving from Department of Health and Rehabilitative Services access to case files of food stamp recipients in all households receiving $125.00 per month or more in food stamps. This procedure was later amended by obtaining the same file access by subpoena.

The initial application form required the applicant to provide information on the household's income and expenses, assets and liabilities, number of members in the household and their relationship to the head of the household and other similar information. As a part of the process of the investigation, the State Attorney's Office undertook to ascertain the validity of some of that information such as address, family members, and employment through individual local police officers without making direct contact with the

recipient household. The officers were also instructed not to unnecessarily disclose any of the information provided to them.

The Plaintiffs contend that their constitutional and federal regulatory rights of privacy will be violated by the disclosure to the State Attorney of the private information in their case files. The State Attorney for the Fourth Judicial Circuit of Florida claims access to the food stamp case files as a part of the general investigative power of the office and because the office of the State Attorney is directly connected with the enforcement of the program. The posture of the DHRS office for Duval County is to provide the State Attorney's Office access to these files upon receipt of a subpoena.

A Preliminary Injunction is an extraordinary remedy which will only be granted after satisfying the necessary requisites. Henry v. National Bank of

Clarksdale, 595 F.2d 291 302 (5th Cir. 1979); Compact Van Equipment Company, Inc. v. Leggett and Platt, Inc. v. Bairneau, 566 F.2d 952 (5th Cir. 1975); Canal Authority of State of Florida v. Calloway, 489 F.2d 567 (5th Cir. 1974). One of the requisite is the showing of a substantial likelihood of succeeding on the merits of Plaintiffs' claims. The Plaintiffs rely on both federal regulatory and constitutional claims. Before addressing constitutional questions, the Court, as it is obliged to do, will first focus on the regulatory claim. New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S.Ct. 1355 (1979).

7 C.F.R. §272.1(c) states in applicable part: "Use or disclosure of information obtained from applicant households, exclusively for the program, shall be restricted to persons directly connected with the administration or

enforcement of the provisions of the Food Stamp Act or regulations . . . ." The release of these files to the State Attorney can therefore be permitted only if the State Attorney is directly connected either with the administration or enforcement of the Act or regulations.

The question is one of construction requiring the interpretation of the regulation in light of the purposes Congress sought to serve. Chapman v. Houston Welfare Rights Organization, 99 S.Ct. 1905 (1979). The Food Stamp statutes, 7 U.S.C. §2011 et seq. as well as the regulations 7 C.F.R. §§270-282 do not specify who is directly connected or how such classification is determined. The legislative history is also silent on the subject.

It appears, from the language of 7 C.F.R. §272.1(c), that the legislature intended to provide some degree of con-

fidentiality of the personal information of the food stamp recipients by preventing general public disclosure or disclosure to persons not directly connected with the program. Any notion however, that there is a protected privacy right in all of the information submitted which would preclude its disclosure to the State Attorneys office is dispelled by the language on the last page, page 8 of the State of Florida Form DFS-FS-351 (Food Stamp Information Application Form) and on the last page of HRS-SES Form 3000 (Application For Food Stamps Part I)* where, above the signature line on each form, the following appears:

> "..I authorize Division of Family Services and the Division of Public Assistance Fraud to verify any information given herein and to make inquiry of past or present employers and records financial or otherwise,"

as is also provided for in F.S. 11.50(b) and by the provisions of F.S. 409.355 which

makes names of recipients and amounts of public assistance payments matters of public record.

It is obvious that the right to verify is the right to know what is sought to be verified and the Division of Public Assistance Fraud is nowhere precluded from availing itself of the expertise and manpower of the State Attorneys investigative staff in that process.

The affidavit of Maurice S. Atwater, Jr. filed March 27, 1980 shows that the activities of the State Attorneys Office were conducted with the knoweldge, assistance, advice and cooperation of U. S. Department of Argriculture, Office of the Inspector General, Department of Health and Rehabilitative Services and Division of Public Assistance Fraud. These agencies apparently concluded that the State Attorney was directly connected with the enforcement of the Act and cooperated with

that office in its investigatory role.

The Regulatory references encouraging the referral of suspected fraud cases to the State Attorney do not require the conclusion that the State Attorney may not act other than in referred cases. C.F.R. 273.16(e)(2). Such regulations are equally consistent with the concept that fraud discovered by any of the various agencies is preferably to be prosecuted by and therefore referred to the State Attorney as opposed to a Federal Prosecutor.

Congress has manifested its intention, to protect to some extent, the confidentiality of personal information and to also encourage the participation of the State Attorney in the control of food stamp fraud. These regulations should be so construed as to effectuate both purposes if possible. U. S. v. Kimbell Foods, Inc., 440 U.S. 715,738 (1979); Perry v. Commerce Loan Co., 383 U.S. 392 (1966).

The Court finds that the State Attorney is within that category of persons "directly connected" with the enforcement of the Food Stamp Act and is entitled to access to the recipient files for use in the enforcement of the Act.

On the Constitutional issue, Plaintiffs cite Plante v. Gonzales, 575 F.2d 1119 (5th Cir. 1978) for the principle that "(t)he Supreme Court has clearly recognized that the privacy of ones personal affairs is protected by the Constitution." However, the Court went on to sustain a legislative foray into that protected right by upholding the requirement of public disclosure of extensive financial records of members of the legislature.

The Plante Court, in arriving at its decision to sustain this invasion of privacy rights, concluded that in evaluating privacy claims, a balancing test

ought properly be applied between the individual interest in preserving privacy and the governmental interest in infringing on that privacy.

Plaintiffs assert the individual interest in maintaining privacy is extremely strong because of the personal nature of the information regarding who is living in the home, what the household owns, the source of household income, the fact that the household is receiving government assistance, etc.

On the other hand there is a substantial governmental and public interest in the restricted disclosure of this information. The term restricted is used because there is no suggestion or contention that there is either desire or intention to make this information general public information or to extend its use or disclosure to other than those "directly connected" with and who therefore have a

legitimate official interest in its use. The governmental and public interest in such restricted disclosure is served in this use because fraud in the program is thereby curtailed, benefits are limited to those for whom they were intended and the public perception of the Food Stamp program as a whole is changed from one described derisively a having recipients driving up in late model Cadillacs to pick up their food stamps to one recognized for serving the laudable purpose for which it was created. That there are instances of fraud should come as no surprise to anyone, but certainly the program should not be permitted to be publicly typified by those who abuse it. To this extent the government and the public have a vital interest in ferreting out those who do abuse the program and without access to the applications and reports, effective detection of fraud would be virtually impossible.

The Court finds neither regulatory nor Constitutional inhibition to the disclosure of case files to the office of the State Attorney for use in the enforcement of the Food Stamp Act. Nixon v. Administrator of General Service, 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977).

Plaintiffs having failed to demonstrate a substantial likelihood of success on the merits, only a strong showing of irreparable harm could justify granting the preliminary injunction. Tanner v. McCall, 441 F.Supp. 503 (M.D. Fla. 1977). Having found no protected right of privacy in the information furnished, the only harm to Plaintiffs by its disclosure and use by the State Attorney would come from its use in criminal prosecution in which event Plaintiffs remedy by attempted suppression is complete. It is therefore

ORDERED:

1. That Plaintiffs' Petition for Preliminary Injunction is denied.

DONE AND ORDERED at Jacksonville, Florida this 11th day of April, 1980.

/s/ WILLIAM CASTAGNA
UNITED STATES DISTRICT JUDGE

* Affidavit of Herbert M. Surles, Social Economic Services Program Specialist for Food Stamp Program in Health and Rehabilitative Services District IV, Jacksonville, Florida states that these forms have been in use for the past two years.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALICE ROBERTS, MARY JO ROBERTS, CLARA LEE LONDON, JANE DOE, and all other persons similarly situated,

Plaintiff,

vs.

Case No. 80-183-Civ-J-WC

EDWARD T. AUSTIN, et al.,

Defendants.

O R D E R

Plaintiffs move this Court to enjoin certain activities by the Department of Health and Rehabilitative Services pursuant to Rule 62(c), F.R.Civ.P. pending appeal; or in the alternative, Plaintiffs seek an interim stay to afford them time to seek an injunction pending appeal from the United States Court of Appeal for the Fifth Circuit, pursuant to Rule 8(a) F.R.App.P. Plaintiffs have previously sought a Temporary Restraining Order and Preliminary

Injunction, each of which was denied on March 3, 1980 and April 11, 1980 respectively.

In order to provide Plaintiffs with a reasonable time to obtain the relief sought, Plaintiffs' alternative request will be granted and it is hereupon,

ORDERED:

1. That Plaintiffs will be granted an interim injunction to allow them reasonable time to apply for an injunction to the United States Court of Appeals for the Fifth Circuit pursuant to Rule 8(a), F.R.App.P.

2. That the Department of Health and Rehabilitative Services is hereby enjoined for a period of twenty (20) days from the date hereof from releasing food stamp case files to the Defendant, Edward T. Austin individually or in his official capacity as State Attorney, in the absence of reasonable suspicion of fraud or a search warrant.

DONE AND ORDERED at Jacksonville, Florida this 12th day of May, 1980.

/s/ William Castagna
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRTH CIRCUIT

NO. 80-5384

ALICE ROEBERTS, ET AL.,
Plaintifffs-Appellants,

versus

EDWARD T. AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

Before GEE, RUBIN and POLITZ, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' petition for injunction pending appeal is denied.

IT IS FURTHER ORDERED that appellants motion to expedite the appeal is granted.

Filed June 4, 1980

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

January 13, 1981

Mr. Wesley R. Thies, Clerk
U. S. District Court
P.O. Box 53558
Jacksonville, FL 32201

No. 80-5384 ALICE ROBERTS, ET AL. vs. T. EDWARD AUSTIN, ETC., ET AL.

Dear Mr. Thies:

(XXX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

Enclosed herewith are the following additional documents:

(XXX) Copy of the Court's opinion.

Sincerely,
GILBERT F. GANUCHEAU, Clerk

BY: /s/ Brenda Hauck
Deputy Clerk

IN THE UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

NO. 80-5384

ALICE ROBERTS, ET AL,

Plaintiffs- Appellants,

versus

T. EDWARD AUSTIN, ETC., ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida at Jacksonville

---

O R D E R:

The motion of T. Edward Austin, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

Filed January 13, 1981

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, DIVISION

ALICE ROBERTS, MARY JO ROBERTS, CLARA LEE LONDON, JANE DOE, and all other persons similarly situated,

Plaintiffs,

vs.

Case No: 80-183-Civ-J-WC

T. EDWARD AUSTON, et al.,

Defendants.

ORDER

In accordance with the opinion of the United States Court of Appeals for the Fifth Circuit in Roberts v. Austin, ___ F.2d ____, (5th Cir., Dec. 15, 1980) (No. 80-5384, slip op. p. 2063) it is

ORDERED that:

1. Plaintiff's Motion for Preliminary Injunction is granted.

2. The Department of Health and Rehabilitative Services is enjoined from releasing food stamp files to the State Attorney absent any basis to suspect that

the affected households have committed fraud.

DONE AND ORDERED at Jacksonville, Florida, this 20th day of January, 1981.

/s/William Castagna

UNITED STATES DISTRICT JUDGE

FLORIDA CONSTITUTION

ARTICLE I, §15. Prosecution for crime-offenses committed by children

(a) No person shall be tried for capital crime without presentment or indictment by grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

FLORIDA CONSTITUTION

ARTICLE V, § 17. State Attorneys

In each judicial circuit a state attorney shall be elected for a term of four years. He shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law; provided, however, when authorized by general law, the violations of all municipal ordinances may be prosecuted by municipal prosecutors. A state attorney shall be an elector of the state and reside in the territorial jurisdiction of the circuit. He shall be and have been a member of the bar of Florida for the preceeding five years. He shall devote full time to his duties, and he shall not engage in the private practice of law. State attorneys shall appoint such assistant state attorneys as may be authorized by law. Adopted, special election March 14, 1972.

7 U.S.C. § 2011. Declaration of Policy

It is hereby declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a

food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation. (Aug. 31, 1964, P.L. 88-525, §2, 78 Stat. 703; Jan. 11, 1971, P.L. 91-671, §1, 84 Stat. 2048; Sept. 29, 1977, P.L. 95-113, Title XIII, §1301, 91 Stat. 958.)

7 U.S.C. § 2013. Establishment of Program-Use of Coupons; redeemability

(a) Subject to the availability of funds appropriated under section 2027 of this title, the Secretary is authorized to formulate and administer a food stamp program under which, at the request of the State agency, eligible households within the State shall be provided an opportunity to obtain a more nutritious diet through the issuance to them of an allotment. The coupons so received by such

households shall be used only to purchase food from retail stores which have been approved for participation in the food stamp program. Coupons issued and used as provided in this chapter shall be redeemable at face value by the Secretary through the facilities of the Treasury of the United States.

Distribution of federally donated foods

(b) In jurisdictions where the food stamp program is in operation, there shall be no distribution of federally donated foods to households under the authority of any law, except that distribution may be made (1) on a temporary basis under programs authorized by law to meet disaster relief needs, or (2) for the purpose of the commodity supplemental food program. Distribution of commodities, with or without the food stamp program, shall also be made whenever a request for concurrent or separate food program operations,

respectively, is made by a tribal organization. In the event of distribution on all or part of an Indian reservation, the appropriate agency of the State government in the area involved shall be responsible for such distribution, except that, if the Secretary determines that the tribal organization is capable of effectively and efficiently administering such distribution, then such tribal organizations shall administer such distribution: Provided, That the Secretary shall not approve any plan for such distribution which permits any household on any Indian reservation to participate simultaneously in the food stamp program and the distribution of federally donated foods. The Secretary is authorized to pay such amounts for administrative costs of such distribution on Indian reservation as the Secretary finds necessary for effective administration of such distribution by a State agency or tribal organization.

Regulations; transmittal of copy of regulations to Congressional Committees prior to issuance

(c) The Secretary shall issue such regulations consistent with this chapter as the Secretary deems necessary or appropriate for the effective and efficient administration of the food stamp program and shall promulgate all such regulations in accordance with the procedures set forth in section 553 of Title 5. In addition, prior to issuing any regulation, the Secretary shall provide the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a copy of the regulation with a detailed statement justifying it. As amended Pub.L. 95-113, Title XIII, § 1301, Sept. 29, 1977, 91 Stat. 961.

7 U.S.C. § 2014. Eligible households

(a) Participation in the food stamp program shall be limited to those

households whose incomes and other financial resources, held singly or in joint ownership, are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet. Assistance under this program shall be furnished to all eligible households who make application for such participation. ***

7 U.S.C. §2020. Administration-State responsibility; records, inspection and audit

(a) The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons and the control and accountability thereof. There shall be kept such records as may be necessary to ascertain whether the program is being conducted in compliance with the provisions of this chapter and the regulations issued

pursuant to this chapter. Such records shall be available for inspection and audit at any reasonable time and shall be preserved for such period of time, not less than three years, as may be pecified in the regulations issued pursuant to this chapter. ***

Requisites of State plan of operation

(e) The State plan of operation required under subsection (d) of this section shall provide, among such other provisions as may be required by regulation. ***

(8) Safeguards which limit the use or disclosure of information obtained from applicant households to persons directly connected with the administration or enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter;

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of

the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended Oct. 21, 1976, Pub.L. 94-574, §2, 90 Stat. 2721.

28 U.S.C. §1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under

section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20 (11)) or section 219 of part II of such Act (49 U.S.C. 319), only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11)) or section 219 of part II of such Act (49 U.S.C. 319), originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended Oct.

20, 1978, Pub.L. 95-486, § 9 (a), 92 Stat. 1633.

28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ***

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. Florida Statutes §27.02 Duties before court.

The state attorney shall appear in the circuit and county courts within his judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is party, except as provided in chapters 39 and 959. The intake procedures of chapters 39 and 959 shall apply as provided in those chapters.

Florida Statutes §409.325 Fraud

(1) Any person who knowingly:

(a) Fails, by false statement, misrepresentation, impersonation, or other fraudulent means, to disclose a material fact used in making a determination as to such person's qualification to receive aid or benefits under any state or federally funded assistance program, or

(b) Fails to disclose a change in circumstances in order to obtain or continue to receive under any such program

aid or benefits to which he is not entitled or in an amount larger than that to which he is entitled, or who knowingly aids and abets another person in the commission of any such act is guilty of a crime and shall be punished as provided in subsection (5).

(2) Any person who knowingly:

(a) Uses, transfers, acquires, traffics, alters, forges, or possesses, or

(b) Attempts to use, transfer, acquire, traffic, alter, forge, or possess, or

(c) Aids and abets another person in the use, transfer, acquisition, traffic, alteration, forgery, or possession of, a food stamp, a food stamp identification card, an authorization for the purchase of food stamps, a certificate of eligibility for medical services, or a Medicaid identification card in any manner not authorized by law is guilty of a crime and shall be punished as provided in subsection

(5). For the purposes of this section, the value of an authorization to purchase food stamps shall be the difference between the coupon allotment and the amount paid by the recipient for that allotment.

(3) Any person having duties in the administration of a state or federally funded assistance program who:

(a) Fraudulently misappropriates, attempts to misappropriate, or aids and abets in the misappropriation of, a food stamp, an authorization for food stamps, a food stamp identification card, a certificate of eligibility for prescribed medicine, a Medicaid identification card, or assistance from any other state or federally funded program with which he has been entrusted or of which he has gained possession by virtue of his position, or who knowingly fails to disclose any such fraudulent activity, or

(b) Knowingly misappropriates, attempts to misappropriate, or aids or abets in the misappropriation of, funds given in exchange for food stamps, is guilty of a crime and shall be punished in subsection (5).

(4) Any person who:

(a) Knowingly files, attempts to file, or aids and abets in the filing of, a claim for services to a recipient of benefits under any state or federally funded assistance program for services which were not rendered; knowingly files a false claim or a claim for nonauthorized items or services under such a program; or knowingly bills the recipient of benefits under such a program, or his family, for an amount in excess of that provided for by law or regulation, or

(b) Knowingly fails to credit the state or its agent for payments received from social security, insurance, or other sources, or

(c) In any way knowingly receives, attempts to receive, or aids and abets in the receipt of, unauthorized payment as provided herein, is guilty of a crime and shall be punished as provided in subsection (5).

(5)(a) If the value of the assistance or identification wrongfully received, retained, misappropriated, sought, or used is less than an aggregate value of $200 in any 12 consecutive months, such person is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If the value of the assistance or identification wrongfully received, retained, misappropriated, sought, or used is of an aggregate value of $200 or more in any 12 consecutive months, such person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

(6) Any person providing service for which compensation is paid under any state or federally funded assistance program who solicits, requests, or receives, either actually or constructively, any payment or contribution through a payment, assessment, gift, devise, bequest or other means, whether directly or indirectly, from either a recipient of assistance from such assistance program or from the family of such a recipient shall notify the Department of Health and Rehabilitative Services, on a form provided by the department, of the amount of such payment or contribution and of such other information as specified by the department, within 10 days after the receipt of such payment or contribution or, if said payment or contribution is to become effective at some time in the future, within 10 days of the consummation of the agreement to make such payment or contribution. Failure to

notify the department within the time prescribed is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(7) Repayment of assistance or services wrongfully obtained shall not constitute a defense to, or ground for dismissal of, criminal charges brought under this section.

(8) The introduction into evidence of a paid state warrant made to the order of the defendant shall be prima facie evidence that the defendant did receive assistance from the state.

(9) All records relating to investigations of public assistance fraud in the custody of the Department of Health and Rehabilitative Services are business records within the meaning of s. 92.36. Amended by Laws 1976, c. 76-20, § 1, eff. Oct. 1, 1976.

7 C.F.R. §272.1 General terms and conditions. ***

(f) Retention of records. Each State agency shall retain all program records in an orderly fashion, for audit and review purposes, for a period of 3 years from the month of origin of each record. The State agency shall retain fiscal records and accountable documents for 3 years from the date of fiscal or administrative closure. Fiscal closure means that obligations for or against the Federal government have been liquidated. Administrative closures means that the State agency has determined and documented that no further action to liquidate the obligation is appropriate. Fiscal records and accountable documents include, but are not limited to claims, documentation of lost benefits, and Form FNS-286, "Certification of Transfer of

Household Benefits." Retention methods for ATP cards are provided in part 274.

7 C.F.R. §272.4 Program administration and personnel requirements. ***

(e) Training. The State agency shall institute a continuing training program for food stamp eligibility workers, hearing officials, performance reporting system reviewers, and for outreach staff, including hotline operators and individuals involved in prescreening activities.

(1) Minimum requirements. (i) The State agency shall designate a full-time State food stamp training coordinator responsible for the conduct and evaluation of the food stamp training program, including the development of training materials, supervising the conduct of training sessions, insuring that appropriate personnel receive training and assuring compliance with the public participation standards specified in

paragraph (e)(1)(iv) of this section. In addition, the State agency shall designate additional staff at either the State or local level to provide training to the appropriate personnel. FNS may provide a waiver from the requirement for a full-time position if the State agency can demonstrate that because of a limited caseload the full-time services of a training coordinator are not necessary or that the State agency otherwise has the capability of fulfilling the requirements of this section.

(ii) State agency training programs shall cover eligibility criteria, certification procedures, household rights and responsibilities including nondiscrimination rights, and other job-related responsibilities concerning the certification of households, for example, interviewing skills. The content of training programs shall be reviewed on a

semi-annual basis in light of program deficiencies identified through the State agency's performance reporting system and modifications shall be made where warranted. Changes in policy or procedures stemming from court actions or revisions to legislation and regulations shall be promptly reflected in State training programs.

(iii) Employees assigned responsibility for the certification of households shall be provided with sufficient training prior to initially assuming their duties. As needed, formal training shall be provided periodically to all certification staff. The need shall be established by policy changes and program deficiencies identified by the performance reporting system. Inadequate performance by individual employees may also indicate the need for training.

(iv) The State agency shall allow public attendance at formal certification training sessions that are conducted on a statewide, citywide, or regional (multi-project area) basis. Public attendance at these training sessions shall be allowed for 5 percent of the total attendance at the session, or five training slots, whichever number is smaller except that public attendance need not be provided at sessions conducted for fewer than 20 persons. The State agency shall invite individuals from the State who represent recipients or organizations working on behalf of recipients, who are knowledgeable about program eligibility rules and certification requirements, and who are actively engaged in work or volunteer activity related to food stamp certification rules. The State agency shall not exclude arbitrarily individuals (who otherwise meet these criteria) due to

disagreements between these individuals and the State agency concerning aspects of State agency operations. The State agency may limit the role of public participants to observation only.

(v) Training shall also be provided to State agency outreach workers, including hotline operators, and to receptionists and others who prescreen or provide other information services to applications or the public. Although this training need not be as comprehensive as that for certification personnel, it shall be in sufficient detail and frequency to insure that low-income households have access to accurate program information and that prescreening, when conducted, is accurate.

(vi) Training shall also be provided to volunteers and to the staff of other organizations and agencies that the State agency uses for outreach, prescreening, and providing program information. The

training shall be in sufficient detail and frequency to insure that information provided to low-income households is accurate.

(vii) State agency hearing officials and performance reporting system reviewers, including quality control reviewers, shall be provided with sufficient training prior to initially assuming their duties. This training shall include a detailed and comprehensive study of the regulations and State agency hearing or performance reporting procedures, as appropriate. As needed, formal training also shall be provided periodically to hearing officials and reviewers. The need shall be established by policy changes and program deficiencies indicated by the performance reporting system. Inadequate performance by an individual employee may also indicate the need for training.

(2) FNS review. (i) FNS will review and approve State agency procedures for training.

(ii) FNS will review the effectiveness of State agency training based on information obtained from the performance reporting system and other sources.

(3) Training for the transition. The State agency shall provide training on all eligibility criteria and certification procedures, including the processing standards, to eligibility workers and supervisors before they begin to certify households under these regulations. The requirements for public participation in training sessions, as set forth in paragraph (e)(1)(iv) of this section, shall be implemented with these training sessions. The State agency shall also provide training to hearing officials and quality control reviewers prior to their assuming duties under these regulations. The State agency shall, during conversion to the new rules provide training promptly where program reviews indicate that training is

needed to ensure the accurate implementation of these regulations.

7 C.F.R. §273 CERTIFICATION OF ELIGIBLE HOUSEHOLDS

7 C.F.R. §273.2 Application processing

(a) General purpose. The application process includes filing and completing an application form, being interviewed, and having certain information verified. The State agency shall act promptly on all applications and provide food stamp benefits retroactive to the month of application to those households that have completed the application process and have been determined eligible. Expedited service shall be available to households in immediate need. Specific responsibilities of households and State agencies in the application process are detailed below.

(b) Food stamp application form. All State agencies shall use an application form designed by FNS. FNS may approve a

deviation from that form to accommodate the use of a combined PA/food stamp application form, the requirements of a computer system, or other exigencies for which the State agency can submit adequate justification, provided the form is understandable to applicants and easy to complete. Each application form shall contain a description in understandable terms in prominent and boldface lettering of the civil and criminal provisions and penalties for violations of the Food Stamp Act.

(c) Filing an application. (1) Household's right to file. Households must file food stamp applications by submitting the forms to the food stamp office either in person, through an authorized representative or by mail. The length of time a State agency has to deliver benefits is calculated from the date the application is filed in the food stamp office designated by the State agency to accept the

household's application. Each household has the right to file an application form on the same day it contacts the food stamp office during office hours. The household shall be advised that it does not have to be interviewed before filing the application and may file an incomplete application form as long as the form contains the applicant's name and address, and is signed by a responsible member of the household or the household's authorized representative. State agencies shall document the date the application was filed by recording on the application the date it was received by the food stamp office.

(2) Contacting the food stamp office. (i) State agencies shall encourage households to file an application form the same day the household or its representative contacts the food stamp office in person or by telephone and expresses interest in obtaining food stamp assistance. If a

household contacting the food stamp office by telephone does not wish to come to the appropriate office to file the application that same day and instead prefers receiving an application through the mail, the State agency shall mail an application form to the household on the same day the telephone request is received. An application shall also be mailed on the same day a written request for food assistance is received.

(ii) If a household contacts the wrong certification office within a project area, either in person or by telephone, the certification office shall, in addition to meeting the requirements in paragraph (c)(2)(i) of this section, give the household the address and telephone number of the appropriate office. If the household has mailed its application to the wrong office within a project area, the certification office shall mail the application to the appropriate office on the same day.

(3) Availability of the application form. The State agency shall make application forms readily accessible to potentially eligible households and those groups and organizations involved in outreach efforts. The State agency shall also provide an application form to anyone who requests the form.

(4) Notice of right to file. The State agency shall post signs in the certification office which explain the application processing standards and the right to file an application on the day of initial contact. The State agency shall include similar information about same day filing in outreach materials and on the application form.

(5) Withdrawing application. The household may voluntarily withdraw its application at any time prior to the determination of eligibility. The State agency shall document in the case file the

reason for withdrawal, if any was stated by the household, and that contact was made with the household to confirm the withdrawal. The household shall be advised of its right to reapply at any time subsequent to a withdrawal.

(d) Household cooperation. To determine eligibility, the application form must be completed and signed, the household or its authorized representative must be interviewed, and certain information on the application must be verified. If the household refuses to cooperate with the State agency in completing this process, the application shall be denied at the time of refusal. For a determination of refusal to be made, the household must be able to cooperate, but clearly demonstrate that it will not take actions that it can take and that are required to complete the application process. For example, to be denied for refusal to cooperate, a household must

refuse to be interviewed not merely failing to appear for the interview. If there is any question as to whether the household has merely failed to cooperate, as opposed to refused to cooperate, the household shall not be denied. The household shall also be determined ineligible if it refuses to cooperate in any subsequent review of its eligibility, including reviews generated by reported changes, recertifications, or as part of a quality control review. Once denied or terminated for refusal to cooperate, the household may reapply but shall not be determined eligible until it cooperates.

(e) Interviews. (1) All applicant households, including those submitting applications by mail, shall have face-to-face interviews in a food stamp office or other certification site with a qualified eligibility worker prior to initial certification and all recertifications. The

individual interviewed may be the head of household, spouse, any other responsible member of the household, or an authorized representative. The interviewer shall not simply review the information that appears on the application, but shall explore and resolve with the household unclear and incomplete information. Households shall be advised of their rights and responsibilities during the interview, including the appropriate application processing standard and the households' responsibility to report changes. The interview shall be conducted as an official and confidential discussion of household circumstances. The applicant's right to privacy shall be protected during the interview. Facilities shall be adequate to preserve the privacy and confidentiality of the interview.

(2) The office interview shall be waived if requested by any household which

is unable to appoint an authorized representative and which has no household members able to come to the food stamp office because they are 65 years of age or older, or are mentally or physically handicapped. The office interview shall also be waived if requested by any household which is unable to appoint an authorized representative and lives in a location which is not served by a certification office as provided in §272.5. The State agency shall waive the office interview on a case-by-case basis for any household which is unable to appoint an authorized representative and which has no household members able to come to the food stamp office because of transportation difficulties or similar hardships which the State agency determines warrants a waiver of the office interview. These hardship conditions include, but are not limited to: Illness, care of a household member,

prolonged severe weather, or work hours which preclude in-office interview. The State agency shall determine if the transportation difficulty or hardship reported by a household warrants a waiver of the office interview and shall document in the case file why a request for a waiver was granted or denied.

(i) The State agency has the option of conducting a telephone interview or a home visit for those households for whom the office interview is waived. Home visits shall be used only if the time of the visit is scheduled in advance with the household.

(ii) Waiver of the face-to-face interview does not exempt the household from the verification requirements, although special procedures may be used to permit the household to provide verification and thus obtain its benefits in a timely manner, such as substituting a collateral contact in cases where documentary

verification would normally be provided.

(iii) Waiver of the face-to-face interview shall not affect the length of the household's certication period.

(3) The State agency shall schedule all interviews as promptly as possible to insure eligible households receive an opportunity to participate within 30 days after the application is filed. If a household fails to appear for the first interview, the State agency shall attempt to schedule another interview. The interview shall be rescheduled by the State agency without requiring the household to provide good cause for failing to appear. However, if the household does not appear for the rescheduled interview, the State agency need not initiate action to schedule any further interviews unless the household requests that another interview be scheduled.

(f) Verification. Verification is

the use of third-party information or documentation to establish the accuracy of statements on the application.

(1) Mandatory verification. State agencies shall verify the following information prior to certification for households initially applying:

(i) Gross nonexempt income. Gross nonexempt income shall be verified for all households prior to certification. However where all attempts to verify the income have been unsuccessful because the person or organization providing the income has failed to cooperate with the household and the State agency, and all other sources of verification are unavailable, the eligibility worker shall determine an amount to be used for certification purposes based on the best available information.

(ii) Alien status. (A) Based on the application, the State agency shall deter-

mine if members identified as aliens are eligible aliens, as defined in §273.4(a)(2) through (6), by requiring that the household present verification for each alien member.

(B) Aliens in the categories specified in §273.4(a) (2) and (3) shall present an Immigration and Naturalization Service (INS) form I-151 or I-551-- "Alien Registration Receipt Card"; or the "Re-entry Permit," a passport booklet for lawful permanent resident aliens.

(C) Aliens in the categories specified in §273.4(A)(4) through (6) shall present an INS form I-94-- "Arrival Departure Record." The State agency shall accept the INS form I-94 as verification of eligible alien status only if the form is annotated with section 203(a)(7), section 212(d)(5), or section 243(h) of the Immigration and Nationality Act; or if the form is annotated with one of the following terms

or a combination of the following terms: Refugee, parolee, paroled, conditional entry or entrant, or asylum. An INS form I-94 annotated with the letters (A) through (L) shall be considered verification of ineligible alien status unless the alien can provide other documentation from INS which indicates that the alien is eligible. If the INS form I-94 does not bear any of the above annotations and the alien has no other verification of alien classification in his or her possession, the State agency shall advise the alien: That classification under section 203(a)(7), 212(d)(5), or 243(h) of the Immigration and Nationality Act shall result in eligible status; that the alien may be eligible if acceptable verification is obtained; and that the alien may contact INS or otherwise obtain the necessary verification, or if the alien wishes and signs a written consent, that the State agency will contact INS to obtain

clarification of the alien's status.

(D) If an alien is unable to provide any INS document at all (not even an INS form I-94), then the State agency has no responsibility to offer to contact INS on the alien's behalf. The State agency's responsibility exists only when the alien has an INS document that does not clearly indicate eligible or ineligible alien status. In any event, the State agency shall not contact INS to obtain information about the alien's correct status without the alien's written consent.

(E) If the proper INS documentation is not available, the alien may state the reason and submit other conclusive verification. The State agency shall accept other forms of documentation or corroboration from INS that the alien is classified pursuant to section 101(a)(15), 101(a)(20), 203(a)(7), 212(d)(5), 243, or 249 of the Immigration and Nationality Act, or other

conclusive evidence such as a court order stating that deportation has been withheld pursuant to section 243(h) of the Immigration and Nationality Act.

(F) While awaiting acceptable verification the alien whose status is questionable shall be ineligible, but the eligibility of the remaining members (if any) shall be determined in accordance with the procedures in §273.11(d). If the alien does not wish to contact INS or give permission for the State agency to contact INS, the household shall be given the option of withdrawing its application or participating without that member.

(iii) Utility expenses. The State agency shall verify a household's utility expenses if the household wishes to claim expenses in excess of the State agency's utility standard and the expenses would actually result in a deduction. If the household's actual utility expenses cannot

be verified before the 30 days allowed to process the application expire, the State agency shall use the standard utility allowance, provided the household is entitled to use the standard as specified in §273.9(d). If the household wishes to claim expenses for an unoccupied home, the State agency shall verify the household's actual utility expenses for the unoccupied home in every case and shall not use the standard utility allowance.

(2) Verification of questionable information. With the exception of liquid resources and loans, State agencies shall verify all other factors of eligibility prior to certification only if they are questionable and affect a household's eligibility or benefit level. Procedures for verifying loans and liquid resources are described in paragraph (3) of this section. To be considered questionable, the information on the application must be

inconsistent with statements made by the applicant, inconsistent with other information on the application or previous applications, or inconsistent with information received by the State agency. When determining if information is questionable, the State agency shall base the decision on each household's individual circumstances. A household's report of expenses which exceed its income may be grounds for a determination that further verification is required. However, this circumstance shall not, in and of itself, be grounds for a denial. The State agency shall instead explore with the household how it is managing its finances, whether the household receives excluded income or has resources, and how long the household has managed under these circumstances. Procedures described below shall apply when information concerning one of the following eligibilty requirements is questionable:

(i) Household composition. If questionable, State agencies shall verify any factors affecting the composition of a household such as household size and boarder status. However, due to the difficulty in verifying whether or not a group of individuals customarily purchases and prepares meals together and therefore, constitutes a household, State agencies shall generally accept the household's statement regarding food preparation and purchasing.

(ii) Citizenship. (A) When a household's statement that one or more of its members are U. S. citizens is questionable, the household shall be asked to provide acceptable verification. Acceptable forms of verification include birth certificates, religious records, voter registration cards, certificates of citizenship or naturalization provided by INS, such as identification cards for use of resident

citizens in the United States (INS form I-179 or INS Form I-197) or U. S. Passports. Participation in the AFDC program shall also be considered acceptable verification if verification of citizenship was obtained for that household. If the above forms of verification cannot be obtained and the household can provide a reasonable explanation as to why verification is not available, the State agency shall accept a signed statement from someone who is a U.S. citizen which declares, under penalty of perjury, that the member in question is a U. S. citizen. The signed statement shall contain a warning of the penalties for helping someone commit fraud, such as: If you intentionally give false information to help this person get food stamps, you may be fined, imprisoned, or both.

(B) The member whose citizenship is in question shall be allowed to participate

for 2 months pending verification of citizenship if the household is otherwise eligible and efforts are being made to obtain the necessary verification. If verification has not been obtained within 2 months, the member whose citizenship is in question shall be ineligible and that member's income and resources shall not be considered available to any remaining household members.

(iii) Tax dependency. The State agency shall verify the tax dependency status of students who are subject to the tax dependency rules described in §273.5 and who do not know their tax dependency status or who provide questionable information. For example, the State agency may consider a student's statement concerning tax dependency questionable if the student receives enough financial support from the parents or guardians (such as the payment of tuition or rent) to indicate that the

parents or guardians may be providing more than one-half of the student's support. The State agency shall verify the student's tax dependency status by mailing a simple form designed by FNS to the student's parent. The verification form will require the taxpayer to state whether the student is claimed or could be claimed as a tax dependent. If the student is or could be claimed as a tax dependent, the parent will be requested to indicate whether the parent's household is currently certified for food stamps. If the parent's household is not certified, the parent must provide household size and gross income figures so an eligibility determination can be made based on the FNS gross income tables, discussed in §273.5(b). FNS may approve deviations from the tax dependency form under the same conditions deviations are granted for the application form, as specified in §273.2(b). The parent's failure to

supply requested information, or a parental response which indicates student ineligibility, shall result in the student being declared ineligible. Students shall have an opportunity to demonstrate that they should not be declared ineligible either through an informal appeal to the eligibility worker or through a fair hearing as provided in §273.15.

(iv) Deductible expenses. Deductible expenses, except for utility costs which exceed the standard and utility costs for unoccupied homes, shall be verified only if questionable and if allowing the expense would actually result in a deduction. For example, rent, even if questionable, would not be verified if the household's child care expenses exceeded the limit on the combined dependent care/shelter deduction since the amount of the rent cannot alter the amount of the deduction.

(A) Households that wish to claim

shelter costs for a home that is unoccupied because of employment or training away from the home, illness, or abandonment caused by a natural disaster or casualty loss must provide verification of actual utility costs if the costs would result in a deduction. These households are also responsible for providing verification of any other shelter costs of the unoccupied home if the cost is questionable and it would result in a deduction. The State agency is not required to assist households in obtaining verification of this expense if the verification would have to be obtained from a source outside of the project area.

(B) If a deductible expense must be verified and obtaining the verification may delay the household's certification, the State agency shall advise the household that the household's eligibility and benefit level may be determined without providing a deduction for the claimed but unveri-

fied expense. Shelter costs would be computed without including the questionable and unverified components. The standard utility allowance shall be used if the household is entitled to claim it and has not verified higher actual costs. If the expense cannot be verified within 30 days of the date of application, the State agency shall determine the household's eligibility and benefit level without providing a deduction for the unverified expense. If the household subsequently provides the missing verification, the State agency shall redetermine the household's benefits, and provide increased benefits, if any, in accordance with the timeliness standards in §273.12 on reported changes. The household shall be entitled to the restoration of any benefits as a result of the disallowance of the expense only if the expense could not be verified within the 30-day processing standard because the

State agency failed to allow the household sufficient time, as defined in paragraph (h)(1) of this section, to verify the expense. If the household would be ineligible unless the expense is allowed the household's application shall be handled as provided in paragraph (h) of this section.

(3) Liquid resources and loans. The State agency may determine when to verify liquid resources and if moneys received by households are loans, provided that, at a minimum, these items shall be verified if questionable as specified in paragraph (2) of this section. When verifying that income is exempt as a loan, a legally binding agreement is not required. A simple statement signed by both parties which indicates that the payment is a loan and must be repaid shall be sufficient verification. However, if the household receives payments on a recurrent or regular basis from the same source but claims the

payments are loans, the State agency may also require that the provider of the loan sign an affidavit which states that repayments are being made or that payment will be made in accordance with an established repayment schedule.

(4) Sources of verification.

(i) Documentary evidence. State agencies shall use documentary evidence as the primary source of verification. Documentary evidence consists of a written confirmation of a household's circumstances. Examples of documentary evidence include wage stubs, rent receipts, and utility bills. Although documentary evidence shall be the primary source of verification, acceptable verification shall not be limited to any single type of document and may be obtained through the household or other source. Whenever documentary evidence cannot be obtained, State agencies shall use alternate sources

of verification such as collateral contacts and home visits.

(ii) Collateral contacts. A collateral contact is a verbal confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made either in person or over the telephone. The acceptability of a collateral contact shall not be restricted to a particular individual but may be anyone that can be expected to provide an accurate third-party verification of the household's statements. Examples of acceptable collateral contacts are employers, landlords, social service agencies migrant service agencies, and neighbors of the household.

(iii) Home visits. Home visits shall be used as verification only if documentary evidence cannot be obtained and the visit is scheduled in advance with the household.

(iv) Discrepancies. Where information

from another source contradicts statements made by the household, the household shall be afforded a reasonable opportunity to resolve the discrepancy prior to an eligibility determination.

(5) Responsibility for obtaining verification.

(i) The household has primary responsibility for providing documentary evidence to support its income statements and to resolve any questionable information. Households may supply documentary evidence in person, through the mail, or through an authorized representative. The State agency shall accept any reasonable documentary evidence provided by the household and shall be primarily concerned with how adequately the verification proves the statements on the application. If it would be difficult or impossible for the household to obtain the documentary evidence in a timely manner,

the State agency shall offer assistance to the household in obtaining the documentary evidence, except as otherwise stated in this section.

(ii) Whenever documentary evidence cannot be obtained, the State agency shall substitute a collateral contact or a home visit. The State agency shall rely on the household to provide the name of any collateral contact. The household may request assistance in designating a collateral contact. The State agency is not required to use a collateral contact designated by the household if the collateral contact cannot be expected to provide an accurate third-party verification. When the collateral contact designated by the household is unacceptable, the State agency shall ask the household to designate another collateral contact. The State agency is responsible for obtaining verification from acceptable

collateral contacts.

(6) Documentation. Case files must be documented to support eligibility, ineligibility, and benefit level determinations. Documentation shall be in sufficient detail to permit a reviewer to determine the reasonableness and accuracy of the determination. Where verification was required to resolve questionable information, the State agency shall document why the information was considered questionable and what documentation was used to resolve the questionable information. The State agency shall also document the reason why an alternate source of verification, such as a collateral contact or home visit, was needed, and the reason a collateral contact was rejected and an alternate requested.

(7) BENDEX. If documentary evidence of social security benefits is not readily available from the applicant, the State

agency may verify the income through the Beneficiary Data Exchange (BENDEX). The amount of social security benefits reported on the application shall be used to compute the household's eligibility and benefit level pending receipt of verification from BENDEX. Any household member whose social security benefits will be verified through BENDEX must sign an information release statement which is valid during the certification period, prior to the State agency's submission of the request for verification.

(8) State Data Exchange (SDX). [Reserved.]

(9) Verification subsequent to initial certification. (i) Recertification. At recertification, the State agency shall verify a change in income or a change in actual utility expenses claimed by a household if the source has changed or the amount has changed by more than $25 since

the last time they were verified. State agencies may verify income or actual utility expenses claimed by households which are unchanged or have changed by $25 or less, provided verification is, at a minimum, required when information is questionable as defined in paragraph (f)(2) of this section. All other changes reported at the time of recertification shall be subject to the same verification procedures as apply at initial certification. Unchanged information, other than income and utility expenses shall not be verified at recertification unless the information is questionable as defined in paragraph (f)(2) of this section.

(ii) Changes. Changes reported during the certification period shall be subject to the same verification procedures as apply at initial certification, except that the State agency is not required to verify income or actual utility expenses if

the source has not changed and the amount has changed by $25 or less since the last time they were verified.

(g) Normal processing standard. (1) Thirty-day processing. The State agency shall provide eligible households that complete the initial application process an opportunity to participate as soon as possible, but not later than 30 calendar days after the application was filed. An application is filed the day the appropriate food stamp office receives an application containing the applicant's name and address, which is signed by either a responsible member of the household or the household's authorized representative. Households entitled to expedited processing are specified in paragraph (i) of this section.

(2) Opportunity to participate. An opportunity to participate consists of providing households with an ATP or other

authorization and having an issuance facility open and available for the household to obtain its allotment. If the ATP or coupons are mailed, 2 days shall be allowed for delivery before determining if the household has been provided an opportunity to participate. A household has not been provided an opportunity to participate within the 30-day standard if the ATP or allotment is mailed on the 29th or 30th day. Neither has an opportunity to participate been provided if the ATP is mailed on the 28th day but no issuance facility is open on the 30th day. The State agency must mail the ATP at least 2 days in advance of the 30th day and assure that the ATP can be transacted after it is received but before the 30-day standard expires.

(3) Denying the application. Households that are found to be ineligible shall be sent a notice of denial as soon as possible but not later than 30 days fol-

lowing the date the application was filed. If the household has failed to appear for two scheduled interviews and has made no subsequent contact with the State agency to express interest in pursuing the application, the State agency shall send the household a notice of denial on the 30th day following the date of application. The household must file a new application if it wishes to participate in the program. In cases where the State agency was able to conduct an interview and request all of the necessary verification on the same day the application was filed, and no subsequent requests for verification have been made, the State agency may also deny the application on the 30th day if the State agency provided assistance to the household in obtaining verification when required, as specified in paragraph (f)(5) of this section, but the household failed to provide the requested verification.

(h) Delays in processing. If the State agency does not determine a household's eligibility and provide an opportunity to participate within 30 days of the date the application was filed, the State agency shall take the following action:

(1) Determining cause. The State agency shall first determine the cause of the delay using the following criteria: (i) A delay shall be considered the fault of the household if the household has failed to complete the application process even though the State agency has taken all the action it is required to take to assist the household. The State agency must have taken the following actions before a delay can be considered the fault of the household:

(A) For households that have failed to complete the application form, the State agency must have offered, or attempted to offer, assistance in its completion.

(B) If one or more members of the household have failed to register for work, as required in §273.7, the State agency must have informed the household of the need to register for work and given the household at least 10 days from the date of notification to register these members.

(C) In cases where verification is incomplete, the State agency must have provided assistance when required, as specified in paragraph (f)(5) of this section, and allowed the household sufficient time to provide the missing verification. Sufficient time shall be at least 10 days from the date of the State agency's initial request for the particular verification that was missing.

(D) For households that have failed to appear for an interview, the State agency must have attempted to reschedule the initial interview within 30 days of the date the application was filed. However,

if the household has failed to appear for the first interview and a subsequent interview is postponed at the household's request or cannot otherwise be rescheduled until after the 20th day but before the 30th day following the date the application was filed the household must appear for the interview, bring verification, and register members for work by the 30th day; otherwise, the delay shall be the fault of the household. If the household has failed to appear for the first interview and a subsequent interview is postponed at the household's request until after the 30th day following the date the application was filed, the delay shall be the fault of the household. If the household has missed both scheduled interviews and requests another interview, any delay shall be the fault of the household.

(ii) Delays that are the fault of the State agency include, but are not limited

to, those cases where the State agency failed to take the actions described in paragraphs (h)(1)(i) (A) through (D) of this section.

(2) Delays caused by the household. (i) If by the 30th day the State agency cannot take any further action on the application due to the fault of the household, the household shall lose its entitlement to benefits for the month of application. However, the State agency shall give the household an additional 30 days to take the required action, except that, if verification is lacking the State agency has the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing.

(A) The State agency has the option of sending the household either a notice of denial or a notice of pending status on the 30th day. The option chosen may vary from

one project area to another, provided the same procedures apply to all households within a project area. However, if a notice of denial is sent and the household takes the required action within 60 days of the date the application was filed, the State agency shall reopen the case without requiring a new application. No further action by the State agency is required after the notice of denial or pending status is sent if the household fails to take the required action within 60 days of the date the application was filed, or the State agency chooses the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing and the household fails to provide the necessary verification by this 30th day.

(B) State agencies may include in the notice a request that the household report

all changes in circumstances since it filed its application. The information that must be contained on the notice of denial or pending status is explained in §273.10(g)(1)(ii) and (iii).

(ii) If the household was at fault for the delay in the first 30-day period, but is found to be eligible during the second 30-day period, the State agency shall provide benefits only from the month following the month of application. The household is not entitled to benefits for the month of application when the delay was the fault of the household.

(3) Delays caused by the State agency. (i) Whenever a delay in the initial 30-day period is the fault of the State agency, the State agency shall take immediate corrective action. The State agency shall not deny the application if it caused the delay, but shall instead notify the household by the 30th day after the

application was filed that its application is being held pending. The State agency shall also notify the household of any action it must take to complete the application process. If verification is lacking the State agency has the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing.

(ii) If the household is found to be eligible during the second 30-day period, the household shall be entitled to benefits retroactive to the month of application. If, however, the household is found to be ineligible, the State agency shall deny the application.

(4) Delays beyond 60 days. (i) If the State agency is at fault for not completing the application process by the end of the second 30-day period, and the case file is otherwise complete, the State

agency shall continue to process the original application until an eligibility determination is reached. If the household is determined eligible, and the State agency was at fault for the delay in the initial 30 days, the household shall receive benefits retroactive to the month of application. However, if the initial delay was the household's fault, the household shall receive benefits retroactive only to the month following the month of application. The State agency may use the original application to determine the household's eligibility in the months following the 60-day period, or it may require the household to file a new application.

(ii) If the State agency is at fault for not completing the application process by the end of the second 30-day period, but the case file is not complete enough to reach an eligibility determination, the State agency may continue to process the

original application, or deny the case and notify the household to file a new application. If the case is denied, the household shall also be advised of its possible entitlement to benefits lost as a result of State agency caused delays in accordance with §273.17. If the State agency was also at fault for the delay in the initial 30 days, the amount of benefits lost would be calculated from the month of application. If, however, the household was at fault for the initial delay, the amount of benefits lost would be calculated from the month following the month of application.

(iii) If the household is at fault for not completing the application process by the end of the second 30-day period, the State agency shall deny the application and require the household to file a new application if it wishes to participate. If however, the State agency has chosen the option of holding the application pending

only until 30 days following the date of the initial request for the particular verification that was missing, and verification is not received by that 30th day, the State agency may immediately close the application. A notice of denial need not be sent if the notice of pending status informed the household that it would have to file a new application if verification was not received within 30 days of the initial request. The household shall not be entitled to any lost benefits, even if the delay in the initial 30 days was the fault of the State agency.

(i) Expedited service. (1) Entitlement to expedited service. If otherwise eligible, the following households are entitled to expedited service:

(i) Households with zero net monthly income, as computed in §273.10.

(ii) Households who are destitute as defined in §273.10(e)(3).

(2) Identifying households needing expedited service. The State agency's application procedures shall be designed to identify households eligible for expedited service at the time the household requests assistance. For example, a receptionist, volunteer, or other employee shall be responsible for screening applications as they are filed or as individuals come in to apply.

(3) Processing standards. (i) Zero net income and destitute households. For households entitled to expedited service, except as specified in paragraphs (3)(ii) through (iii) of this section, the State agency shall mail the household's ATP or coupons no later than the close of business of the second working day following the date the application was filed.

The State agency may offer the household the option of having the ATP or coupons mailed by the second working day or

of having the ATP or coupons available for the household or its authorized representative to pick up no later than the start of business of the third working day following the date the application was filed. In States that use an HIR issuance system described in §274.2(f) and that do not provide any mail issuance, the State agency shall have the coupons available for the household or its representative to pick up no later than the start of business of the third working day following the date the application was filed.

(ii) Drug addicts and alcoholics. For residents of drug addiction or alcoholic treatment and rehabilitation centers who are entitled to expedited service, the State agency shall mail an ATP or coupons, or have the ATP or coupons available to be picked up no later than seven working days following the date the application was filed.

(iii) Out-of-office interviews. If a household is entitled to expedited service and is also entitled to a waiver of the office interview, the State agency shall conduct the interview (unless the household cannot be reached) by the first working day following the date the application was filed. If the application is not complete, and a telephone interview is conducted, the State agency shall, at a minimum, be required to complete the application for the household during the interview and mail the completed application the same day to the household for signature. The State agency shall act on the application for these households within the standards specified in paragraphs (i)(3)(i) and (ii) of this section, except that the processing standards shall be calculated from the date a completed and signed application is received rather than the date the application was filed.

(iv) Late determinations. If the prescreening required in paragraph (i)(2) of this section fails to identify a household as being entitled to expedited service and the State agency subsequently discovers that the household is entitled to expedited service, the State agency shall provide expedited service to households within the processing standards described in paragraph (i)(3)(i) and (ii) of this section, except that the processing standard shall be calculated from the date the State agency discovers the household is entitled to expedited service.

(4) Special procedures for expediting service. The State agency shall use the following procedures when expediting certification and issuance:

(i) To expedite the certification process, the State agency shall postpone the verification required by §273.2(f). However, the household's identity and

residency shall be verified through a collateral contact or readily available documentary evidence. Examples of acceptable documentary evidence which the household may provide include, but are not limited to, a driver's license, work or school I.D., voter registration card, or birth certificate. The household's income statements shall be verified through a collateral contact or readily available documentary evidence whenever it can be done in sufficient time to meet the expedited processing standards. However, benefits shall not be delayed beyond the delivery standard described in paragraph (i)(3) of this section solely because income has not been verified.

(ii) Once the household has supplied the name of a collateral contact or has asked the State agency for assistance in locating a collateral contact, the State agency shall promptly contact the

collateral contact or otherwise assist the household in obtaining the necessary verification.

(iii) Households that are certified on an expedited basis and have provided all necessary verification required in paragraph (f) of this section prior to certification shall be assigned a normal certification period. If verification was postponed, the State agency may certify these households for the month of application only or, at the State agency's option, may assign a normal certification period to those households whose circumstances would otherwise warrant a longer certification period. However, in either case, benefits will not be continued past the month of application if verification continues to be postponed.

(A) If certified only for the month of application, the household must reapply and complete the verification requirements

which were postponed.

(B) If a certification period longer than one month is assigned, the State agency shall notify the household in writing that no further benefits be issued until the postponed verification is completed and that if the postponed verification is not completed within 30 days of the date of application, the household's application will be denied. The notice shall also advise the household that if verification results in changes in the household's eligibility or level of benefits, the State agency shall act on those changes without an advance notice of adverse action.

(iv) There is no limit to the number of times a household can be certified under expedited procedures, as long as prior to each expedited certification, the household either completes the verification requirements that were postponed at the last

expedited certification or was certified under normal processing standards since the last expedited certification.

(v) Households requesting, but not entitled to, expedited service shall have their applications processed according to normal standards.

(j) PA and GA households. Households in which all members are applying for public assistance (PA) shall be allowed to apply for food stamp benefits at the same time they apply for PA benefits. These households' food stamp eligibility and benefit levels shall be based solely on food stamp eligibility criteria, and the households shall be certified in accordance with the notice, procedural and timeliness requirements of the food stamp regulations. Households in which all members are applying for State agency administered general assistance (GA) shall, at a minimum, be provided with applications for

food stamp benefits and be referred to the appropriate food stamp office for an eligibility determination. Under certain circumstances, these households may be able to apply jointly for their GA and food stamp benefits.

(1) PA households. (i) The application for AFDC or other public assistance shall contain all the information necessary to determine a household's food stamp eligibility and level of benefits. Information relevant only to food stamp eligibility shall be contained in the PA form or shall be an attachment to it. The PA application shall have a place for the household to indicate if it does not wish to apply for food stamps. The application shall clearly indicate that the household is providing information for both programs, is subject to the criminal penalties of either program for false statements, and waives the notice of adverse action as

specified in paragraph (j)(1)(v) of this section. The joint PA/ food stamp application may also be used for all food stamp applicants, provided the application form is approved for all households by FNS.

(ii) PA applications, except those on which the household has indicated it does not want food stamps, shall be processed as food stamp applications in accordance with all timeliness standards and procedures specified in this section. If the household's intention to apply for food stamps is unclear, the State agency shall determine at the interview, or in other contact with the household, whether or not the household wants the PA application processed for food stamp purposes.

(iii) The State agency shall conduct a single interview at initial application for both public assistance and food stamp purposes. PA households shall not be required to see a different eligibility

worker or otherwise be subjected to two interview requirements to obtain the benefits of both programs. Following the single interview, the application may be processed by separate workers to determine eligibility and benefit levels for food stamps and public assistance. A household's eligibility for food stamp out-of-office interview provisions in §273.2(e)(2) does not relieve the household of any responsibility for a face-to-face interview to be certified for PA.

(iv) For households applying for both public assistance and food stamps, the verification procedures described in paragraphs (f)(1) through (f)(8) of this section shall be followed for those factors of eligibility which are needed solely for purposes of determining the household's eligibility for food stamps. For those factors of eligibility which are needed to determine both PA eligibility and food

stamp eligibility, the State agency may use the PA verification rules. However, the State agency shall not delay the household's food stamp benefits if, at the end of 30 days following the date the application was filed, the State agency has sufficient verification to meet the verification requirements of paragraphs (f)(1) through (f)(8) of this section but does not have sufficient verification to meet the PA verification rules.

(v) As a result of differences in PA and food stamp application processing procedures and timeliness standards, the State agency may have to determine food stamp eligibility prior to determining the household's eligibility for PA payments. Action on the food stamp portion of the application shall not be delayed nor the application denied on the grounds that the PA determination has not been made. If the State agency can anticipate the amount and

the date of receipt of the initial PA payment, but the payment will not be received until a subsequent month, the State agency shall vary the household's food stamp benefit level according to the anticipated receipt of the payment and notify the household. Portions of initial PA payments intended to retroactively cover a previous month shall be disregarded as lump sum payments under §273.9(c)(8). If the amount or date of receipt of the initial PA payment cannot be reasonably anticipated at the time of the food stamp eligibility determination, the PA payments shall be handled as a change in circumstances. However, the State agency is not required to send a notice of adverse action if the receipt of the PA grant reduces or terminates the household's food stamp benefits, provided the household is notified in advance that its benefits may be reduced or terminated when the grant is

received. Households whose PA applications are denied shall not be required to file new food stamp applications but shall have their food stamp eligibility determined or continued on the basis of the original applications filed jointly for PA and food stamp purposes and any other documented information obtained subsequent to the application which may have been used in the PA determination and which is relevant to food stamp eligibility or level of benefits.

(2) GA households. (i) State agencies shall use the joint application processing procedures in paragraph (j)(1) of this section for GA households when the following criteria are met:

(A) The State agency administers a GA program which uses formalized application procedures and eligibility criteria that test levels of income and resources; and,

(B) Administration of the GA program

is integrated with the administration of the PA or food stamp programs, in that the same eligibility workers process applications for GA benefits and PA or food stamp benefits.

(ii) State agencies that have not integrated the administration of their GA program, but otherwise meet the criteria in paragraph (2)(i) of this section may, with FNS approval, jointly process GA and food stamp applications. If approved, State agencies shall adhere to the joint application processing procedures in paragraph (j)(1) of this section.

(iii) State agencies that have not integrated the administration of their GA program, and that do not elect or are not approved to use the joint application processing procedures, shall, at a minimum, advise all GA applicant households of their potential eligibility for food stamp benefits and provide these households with

food stamp applications. In addition, State agencies shall allow households in which all members are applying for GA benefits to leave a signed food stamp application which contains, at a minimum, the household's name and address, at the GA office. The GA office shall forward these applications that same day to the appropriate food stamp office for processing. The procedural and timeliness requirements that apply to the application process shall begin when the food stamp office receives the application. Since there may be delay involved in the transferring of applications from GA offices to food stamp offices, households shall be advised that they may receive faster service if they take tne application directly to the food stamp office.

(iv) In areas where GA programs are administered by local agencies or agencies such as the Department of the Interior's

Bureau of Indian Affairs, the State agency shall endeavor to gain their cooperation in referring GA applicants to the food stamp program. Where possible, this referral should consist of informing the GA applicants of their potential eligibility for food stamp benefits, providing them with food stamp applications and directing them to the local food stamp office.

(3) Households with some PA or GA recipients. State agencies that use the joint application processing procedures in paragraphs (j)(1) and (j)(2) of this section may apply these procedures to a food stamp applicant household in which some, but not all, members are in the PA/GA filing unit. If the State agency decides not to use the joint application procedures for these households, the households shall file separate applications for PA/GA and food stamp benefits. This decision shall not be made on a case-by-case basis, but

shall be applied uniformly to all households of this type in a project area.

(k) SSI households. [Reserved]

7 C.F.R. §273.16 Fraud disqualification.

* * *

(e) Court imposed disqualifications. (1) A court of appropriate jurisdiction, with either the State, a political subdivision of the State, or the United States as prosecutor or plaintiff, may order an individual disqualified from participation in the program for not less than 6 months and not more than 24 months if the court finds that individual guilty of civil or criminal fraud. Court ordered disqualifications may be imposed separate and apart from any action taken by the State agency to disqualify the individual through an administrative fraud hearing.

(2) State agencies are encouraged to refer for prosecution under State or local fraud statutes those individuals suspected

of committing fraud, particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one fraudulent act. The State agency shall confer with its legal representative to determine the types of cases which will be accepted for possible prosecution. State agencies shall also encourage State and local prosecutors to recommend to the courts that a disqualification penalty as provided in section 6(b) of the Food Stamp Act be imposed in addition to any other civil or criminal fraud penalties.

(3) State agencies shall disqualify an individual found guilty of fraud by the courts only if the court orders disqualification and only for the length of time specified by the court. If disqualification is ordered but a date for initiating the disqualification period is not specified, the State agency shall initiate

the disqualification period with the first month following the date the disqualification was ordered. A court ordered disqualification may run concurrently with the 3-month period of disqualification imposed as a result of an administrative fraud hearing. The State agency shall not initiate or continue a court imposed or administratively imposed fraud disqualification period contrary to a court order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by HAND to Mark Greenberg, Esquire, 2070 N. Liberty Street, Jacksonville, Florida 32206, and that all parties required to be served have been served, this 30th day of ~~March~~ April, A.D. 1981.

Stephen R. White
State Attorney's Office
Duval County Courthouse
Jacksonville, Florida
32202
904-633-6910

Leo J. Stellwagen
Assistant District
Council
Dept. of Health and
Rehabilitative Services
P.O. Box 2417-F
Jacksonville, Florida
32211
904-725-3080

NO: 80-1829

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually,
and in his official capacity as
State Attorney, Fourth Judicial
Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. MACKEY, JR.
KENT R. SPUHLER
SUSAN C. JAMIESON
Attorneys for Respondents
Jacksonville Area Legal Aid, Inc.
604 Hogan Street
Jacksonville, Florida 32202
(904) 356-8371

MARK GREENBERG
Attorneys for Respondents
Jacksonville Area Legal Aid, Inc.
2070 North Liberty Street
Jacksonville, Florida 32206
(904) 353-3636

OPINION BELOW

Respondents oppose the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit, Roberts v. Austin, reported at 632 F.2d 1202 (5th Cir. 1980) and contained at Appendix 1-55 of the Petition for Writ Of Certiorari. [1]

JURISDICTION

The opinion of the Fifth Circuit in Roberts v. Austin is dated December 15, 1980; on January 13, 1981, the Fifth Circuit denied the motion of Petitioners for rehearing en banc, and denied the motion of Petitioner for Stay of Mandate. Petitioners are seeking a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, pursuant to Food Stamp Act of 1977, 7 U.S.C. 2011 et seq. and regulations promulgated thereunder, a state agency operating a Food Stamp Program may release any and all case files of Food Stamp recipients to a state prosecutor for investigative purposes, in circumstances where there is no basis to suspect fraud on the part of the affected recipients?

2. Whether the Court of Appeals erred in holding that irreparable harm would result to affected recipients if the state agency administering the Food Stamp Program in Florida were allowed to release any and all Food Stamp case files to a prosecutor for criminal investigation during pendency of this litigation?

---

[1] In two places Petitioners' reproduction of the 5th Circuit's opinion does not distinguish the Court's language from material it cites. At App. 21-22, the Court quotes from Comments of the Dept. of Agriculture, and at App. 22-23, the Court quotes from H.R. Rep. 96-788. In Petitioner's Appendix, neither quote is demarcated from the Court's own language. Compare App. 21-23 with 632 F.2d at 1210.

STATEMENT OF THE CASE

This action was filed as a class action on behalf of Food Stamp recipients in a four-county area of Florida known as the Fourth Judicial Circuit. Prior to the filing of the lawsuit on February 28, 1980, the Department of Health and Rehabilitative Services (hereinafter "HRS"), the state agency administering the Food Stamp Program in Florida, had been, on request, providing unlimited access to all case files of Food Stamp recipients to the state prosecutor for the circuit. The prosecutor's office sought access to the files for the purpose of conducting criminal investigations of every recipient household receiving in excess of $100/month in Food Stamps. HRS released case files to the prosecutor solely upon request, and without any basis to suspect fraud on the part of the affected recipients. The factual circumstances are described in greater detail in the opinion of the Fifth Circuit, Roberts v. Austin, 632 F.2d 1202, 1203-1207, Petitioners' Appendix (hereinafter "App.") 4-15. Recipients contended that this release of case files violated the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq. and the regulations promulgated thereunder. Recipients sought a preliminary injunction from the District Court for the Middle District of Florida. Recipients sought an injunction which would enjoin HRS from releasing the case files of recipients to the prosecutor absent reason to suspect fraud on the part of the affected recipients. On April 11, 1980, the District Court denied the preliminary injunction. The Fifth Circuit granted an expedited appeal, and on December 15, 1980, the Fifth Circuit panel unanimously reversed the District Court and directed entry of the preliminary injunction. The

state agency and the state prosecutor for the Fourth Judicial Circuit moved for rehearing en banc and for a Stay of Mandate. On January 13, 1981, the Fifth Circuit Court of Appeals denied both motions.

In directing entry of the preliminary injunction, the Fifth Circuit concluded that Recipients were substantially likely to prevail on the merits of their regulatory claim, 632 F.2d at 1213, App. at 36, and that recipients would be irreparably harmed if the injunction were not entered, 632 F.2d at 1214, App. at 36-38. The Court found that under the Food Stamp Act and regulations, a state agency administering the Food Stamp Program could turn over case files to a state prosecutor only when there was valid reason to suspect fraud in the particular household. The Court found that recipients had a "legitimate expectation" that information provided to the program would be kept confidential absent reason to suspect fraud. The Court noted limitations in the Act and regulations on the nature and type of verification to be conducted by the state agency, and observed that by "the simple expedient of turning over all case files to a state attorney, HRS may accomplish indirectly the verification which it is barred from doing by the federal food stamp regulations." 632 F.2d at 1211, App. at 26.

The Court also held that when a legitimate expectation of privacy exists, the violation of privacy is harmful in and of itself. The Court therefore concluded that irreparable harm would result if the state agency were free to release 70,000 additional case files to the prosecutor during the pendency of the action. Considering the substantial likelihood of success, the presence of

irreparable harm, and the absence of harm to the other parties or the public interest, the Court held it was error for the District Court to deny entry of a preliminary injunction.

In the District Court and Court of Appeals, recipients have also contended that the unrestricted release of case files sought by the state agency would violate recipients' constitutional rights of disclosural privacy. Whalen v. Roe, 429 U.S. 589 (1977). Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). Because the Court of Appeals resolved the regulatory issue in favor of recipients, the Court did not address the constitutional issue. 632 F.2d at 1214, App. at 38-39.

ARGUMENT

This case is not appropriate for a grant of certiorari, because the decision of the Fifth Circuit does not conflict with other judicial decisions, the case is still at a preliminary stage, and there is no basis for the contention that the Fifth Circuit erred in its decision.

First, the decision of the Fifth Circuit conflicts with no other case law. It does not conflict with any decision of this Court. It does not conflict with the decision of any other Court of Appeals (or of any District Court other than the one it reversed). It does not conflict with the decision of a court of last resort of any state.

Second, the course of the litigation thus far has been limited to the disposition of the request for preliminary injunction. As yet, there has been no permanent injunctive relief granted or denied. The District Court has held no trial on the merits. There has been no final order. The action of the Court of Appeals for which Petitioners seek review was an order remanding the case to the District Court for entry of a preliminary injunction.

This Court has previously held that where a Court of Appeals has remanded a case for further action by the District Court, the case is "not yet ripe for review" by the Supreme Court. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Arogstook Railroad Co., 389 U.S. 327 (1976). The Court has stated that the fact that a decree for which review is sought is not final, is in itself a sufficient ground to deny a writ of certiorari, and that except in extraordinary cases, the writ of certiorari is not entered until the final decree. Hamilton-Brown Shoe Co. v. Wolf Brothers & Company, 240 U.S. 251 257-258 (1916).

There are no extraordinary circumstances that would merit granting the writ herein. In determining that a preliminary injunction should be granted, the Fifth Circuit expressly found that the entry of the injunction would not affect the normal process by which food stamp fraud is investigated and prosecuted in Florida. 632 F.2d at 1213, App. at 35-36. The Court concluded that the preliminary injunction "merely prohibits the state attorney from conducting a fishing expedition in food stamp files" during the pendency of the litigation. 632 F.2d at 1213, App. at 35. Despite the

intense tone of the Petition for Writ, the state agency does not contend that the injunction in any manner interferes with the normal, historic process by which food stamp fraud is investigated. In that normal process, whenever the state agency develops or is presented with reason to suspect fraud in a particular case, the agency may release the file for investigation and prosecution. A Court Order enjoining the state agency from turning over all of its files during the litigation is not an extraordinary circumstance that would merit granting the writ.

Third, while the Supreme Court has not had occasion to interpret the particular provisions of the Food Stamp Act and regulations on which the Fifth Circuit based its decision, there is no basis to believe that the Court of Appeals erred. The Court conducted a careful and detailed analysis in concluding that recipients were substantially likely to prevail on the claim that the Act and regulations bar state agencies from releasing case files absent reason to suspect fraud. In examining the regulatory structure of the Food Stamp Program, the Fifth Circuit found an intention by Congress and the Department of Agriculture to maintain the confidentiality of case files in the Food Stamp Program. The Court found that the sole section of the implementing regulations which makes reference to prosecutors authorizes the referral to state prosecuting authorities in cases where individuals are suspected of committing fraud. 632 F.2d at 1210, App. at 24-25. The Court found that under the Food Stamp Act and regulations, the state agency was expressly barred from certain types and methods of verification absent reason to question the information provided by recipients. 632 F.2d at 1208-10, App. at 19-24. The Court found that by turning over all case files to a prosecutor, the state agency

was seeking to accomplish indirectly the verification which it was barred from doing in the federal food stamp regulations. 632 F.2d at 1211, App. at 26.

The Court also noted, citing applicable regulations and testimony before Congress, that substantially similar congressional language in the Aid to Families With Dependent Children Program, 42 U.S.C. § 601 et seq., had been interpreted to bar referral of a case file to a prosecutor where there is no basis to suspect fraud. The Court noted that there was no reason to interpret the Food Stamp regulatory language in a manner which would result in the same congressional language leading to inconsistent protections. 632 F.2d at 1212, App. at 23-27.

In their Petition for Writ of Certiorari, as throughout this litigation, the state agency and prosecutor have continued to assert that the prosecutor could prosecute more fraud cases if the state agency turned over all of its files and the prosecutor was allowed to utilize those files to investigate any and all recipients. This assertion relates solely to the wisdom of existing rules, and is not properly directed to the Court.

While recipients believe that the regulatory structure is eminently sensible as an attempt to balance the privacy rights of applicants/recipients and the need to investigate fraud where there is some basis to suspect fraud, the wisdom of the regulatory structure is not before the Court. The question for the Court is whether there is reason to believe that the Court of Appeals erred in its analysis of the Act and the regulations. In that regard, while Petitioners indicate their dislike for the Court of Appeals' conclusions, they do not indicate how or where the Court erred.

In their Petition for Writ, Petitioners raise for the first time the argument that if the Fifth Circuit correctly interpreted the Food Stamp regulations, then those regulations are inconsistent with the Food Stamp Act. The Act, at 7 U.S.C. § 2013(c) authorizes the Secretary of Agriculture to issue such regulations consistent with the Act "as the Secretary deems necessary or appropriate for the effective and efficient administration of the Food Stamp Program."

This Court has previously stated that:

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of enabling legislation."

Mournig v. Family Publication Service, Inc., 411 U.S. 356, 369 (1973) quoting Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 280-281 (1969).

In the instant case, the question then becomes whether there is a reasonable relationship between the Congressional purpose of raising the levels of nutrition among low-income households, 7 U.S.C. § 2011, and the creation of a regulatory structure wherein an applicant for Food Stamps is not compelled to waive all privacy rights in order to receive program benefits. Plainly, a reasonable relationship exists.

In Congressional consideration of the Food Stamp Act Amendments of 1980, Congress' continued sensitivity to the importance of recipient privacy interests was apparent:

> The Program need for certain information is great, but it must be carefully balanced by the need to protect needy individuals from having their privacy bartered away in order to assuage their hunger.

H.R. Report 96-788, Food Stamp Act Amendments of 1980, at 106. The Congressional goal of encouraging the participation of eligible individuals is clearly fostered by a structure of rights wherein an applicant who complies with all program verification requirements in a satisfactory manner is not subjected to unwarranted investigation and invasion of privacy.

The regulatory structure objected to by the state agency and prosecutor is rational and reasonably related to the purposes of the Food Stamp Act. That the state agency and prosecutor disagree with the regulations does not make them irrational.

In sum, the state agency and state prosecutor express disagreement with the Court of Appeals, but do not cite error. After a careful analysis, the Court of Appeals noted a careful balancing of rights in the Food Stamp Act and regulations. Petitioners object to the balance which was struck. That is not a basis for this Court to grant certiorari.

CONCLUSION

The decision for the Fifth Circuit for which review is sought does not conflict with decisions of other courts, is not a final order, does not result in harm to the Petitioners, and is not in error. The Petition for Writ of Certiorari should be denied.

JAMES E. MACKEY, JR.
Attorney for Respondents
Jacksonville Area Legal Aid, Inc.
604 Hogan Street
Jacksonville, Florida 32202
(904) 356-8371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished to each of the following persons by U.S. Mail, this 14th day of May, 1981:

Leo Stellwagen, Esquire
District IV Counsel
Department of HRS
P.O. Box 2417-F
Jacksonville, Florida 32231

Stephen R. White, Esquire
Office of State Attorney
Duval County Courthouse
Jacksonville, Florida 32202

Richard W. Kreidler, Esquire
Attorney for Petitioners
4140 Woodcock Drive, Suite 224
Jacksonville, Florida 32207

Fred Tromberg, Esquire
Attorney for Petitioners
1916 Atlantic Boulevard
Jacksonville, Florida 32207

James E. Murray Jr.
ATTORNEY

RECEIVED
MAY 18 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO: 80-1829

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually, and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondents, by and through their undersigned counsel, ask leave to file the attached Brief in Opposition to Petition for Writ of Certiorari in compliance with the requirements of Rule 46, and to proceed in forma pauperis pursuant to Rule 46 in this case.

Affidavits of the Respondents in support of this motion are attached hereto.

JAMES E. MACKEY, JR.
Attorney for Respondents
Jacksonville Area Legal Aid, Inc.
604 Hogan Street
Jacksonville, Florida 32202
(904) 353-3636

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to each of the following persons by U.S. Mail, this 14th day of May, 1981:

Leo Stellwagen, Esquire
District IV Counsel
Department of HRS
P.O. Box 2417-F
Jacksonville, Florida 32231

Stephen R. White, Esquire
Office of State Attorney
Duval County Courthouse
Jacksonville, Florida 32202

Richard W. Kreidler, Esquire
Attorney for Petitioners
4140 Woodcock Drive, Suite 224
Jacksonville, Florida 32207

Fred Tromberg, Esquire
Attorney for Petitioners
1916 Atlantic Boulevard
Jacksonville, Florida 32207

James G. Muckley Jr.
ATTORNEY

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, MARY JO ROBERTS, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

Respondents filed an action in the District Court, Middle District of Florida, seeking, in part, a preliminary injunction to enjoin the state agency administering the Food Stamp Program in Florida from releasing recipient case files to a prosecutor in circumstances where there is no basis to suspect fraud

on the part of the affected recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeals' decision.

Mary G Roberts
MARY JO ROBERTS

Sworn to and subscribed before me
this 28th day of April, 1981.

Carol Hooks
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

Notary Public, State of Florida at Large
My Commission Expires May 10, 1982
Bonded By American Fire & Casualty Company

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually
and in his official capacity as
State Attorney, Fourth Judicial
Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, JANE DOE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

Respondents filed an action in the District Court. Middle District of Florida, seeking, in part, a preliminary injunction to enjoin the state agency administering the Food Stamp Program in Florida from releasing recipient case filed to a prosecutor in circumstances where there is no basis to suspect fraud

on the part of the affected recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeal's decision.

Jane Doe
JANE DOE

Sworn to and subscribed before me
this 27th day of April, 1981.

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES:

Notary Public, State of Florida at Large
My Commission Expires May 10, 1982
Bonded by American Fire & Casualty Company

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, ALICE ROBERTS, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

Respondents filed an action in the District Court, Middle District of Florida, seeking, in part, a preliminary injunction to enjoin the state agency administering the Food Stamp Program in Florida from releasing recipient case files to a prosecutor in circumstances where there is no basis to suspect fraud.

on the part of the affected recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeals' decision.

Alice Roberts
ALICE ROBERTS

Sworn to and subscribed before
me this 24th day of April, 1981.

Carol Hogan
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

Notary Public, State of Florida at Large
My Commission Expires May 10, 1982
Bonded By American Fire & Casualty Company

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually
and in his official capacity as
State Attorney, Fourth Judicial
Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, CLARA LEE LONDON, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

Respondents filed an action in the District Court, Middle District of Florida, seeking, in part, a preliminary injunction to enjoin the state agency administering the Food Stamp Program in Florida from releasing recipient case files to a prosecutor in circumstances where there is no basis to suspect fraud on the part of the affected

recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeals' decision.

Clara Lee London
CLARA LEE LONDON

Sworn to and subscribed before me
this 28th day of April, 1981.

[redacted]
NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

Barry A. Postman

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPTEMBER 28, 1984
BONDED THROUGH NOTARY-ASHTON, INC.

MOTION FILED
OCT 14 1982

NO. 80-1829

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

v.

ALICE ROBERTS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF THE AMICUS CURIAE OUT OF TIME, AND BRIEF OF THE AMICUS CURIAE STATE OF FLORIDA, IN SUPPORT OF THE PETITIONERS

JIM SMITH
Attorney General

JOE BELITZKY
Assistant Attorney General

GERALD B. CURINGTON
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
INTEREST OF AMICUS CURIAE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
CONCLUSION	26

TABLE OF CITATIONS

Cases:	Pages
Branzburg v. Hayes, 408 U.S. 665 (1972)	24
Davis v. United States, 328 U.S. 580 (1946)	23
Eagan v. Demanio, 294 So.2d 639 (Fla. 1974) . . .	3, 12 23
Florida v. Seivert, 312 So.2d 788 (2d DCA, Fla. 1975)	12
Imperato v. Spicola, 288 So.2d 505 (Fla. 1970) . . .	13
Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980)	3, 5, 9, 15, 19, 22 26
Statute:	
7 U.S.C. §2011	10
7 U.S.C. §2020(a)	23
Regulations:	
7 CFR §273.16(e)	18
7 CFR §273.16(e)(2)	15, 17

7 CFR §273.2(e) 14, 15

7 CFR §273.2(f) 15

Other Authorities:

Rule 17.1(c), Rules of the Supreme Court of the United States 8

NO. 80-1829

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

v.

ALICE ROBERTS, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF THE AMICUS CURIAE, STATE OF FLORIDA, IN SUPPORT OF PETITIONERS, OUT OF TIME

The State of Florida respectfully moves this court for leave to file this brief, as amicus curiae, in support of the petitioners herein, out of time. Rule 36.1, Rules of the Supreme Court provides that the brief of an amicus

curiae prior to consideration of a petition for a writ of certiorari must be filed within the time allowed for the filing of a brief in opposition to a petition for certiorari. Despite the above-cited rule provision, counsel for the Amicus Curiae, State of Florida, mistakenly believed that the State of Florida could file an Amicus Curiae brief within the time period permitted for the filing of an Amicus Curiae brief by the Solicitor General of the United States, inasmuch as the Solicitor General has been expressly invited to file such a brief by the Court. Counsel for the State of Florida respectfully submits that the late submission of its brief is inadvertant, but respectfully requests the Court to accept and consider the attached brief, so as to enable the

Court to rule on the pending petition for writ of certiorari with the benefit of having heard from all interested parties.

INTEREST OF AMICUS CURIAE

The Amicus is the State of Florida, with significant interest in the continued ability of the State Attorneys to investigate suspected fraudulent schemes that impose a burden on the public purse. The opinion below, Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), has placed in jeopardy the role of the State Attorneys in self-initiated investigations, and as a result, severely limited the investigatory power as described by the Florida Supreme Court in Eagan v. Demanio, 294 So.2d 639, 640 (Fla. 1974):

> The State Attorneys are constitutional officers (Fla. Const., Art. V, §17, Fla. Stat. Ann.), in whom the Legislature vested the duty to protect (Fla

> Stat., §27.02, Fla. Stat. Ann.).
>
> Before filing an information under oath (Fla. Const., Art. I, §15, Fla. Stat. Ann.), they necessarily must conduct an investigation to determine whether or not they should execute the statutory oath. . . Investigating activity is necessary to the efficient execution of a prosecutor's duty . . .

Because the broad investigatory power given the State Attorneys is necessary to ensure the independence of these officers, this case presents clearly the opportunity for affirmation of a broad, although not unrestricted, power of investigation for all state attorneys.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit Court of Appeals in Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), unreasonably intrudes upon the lawful authority of Petitioner State Attorney for the Fourth Judicial Circuit of Florida, by preventing him from investigating fraud in the Federal Food Stamp Program, absent a referral by the Florida Department of Health and Rehabilitative Services. The Court of Appeals' decision misconstrues the meaning and intent of Congress in providing for a certain amount of privacy to food stamp recipients as part of the application process.

Inasmuch as Petitioners have not violated any constitutional right to privacy enjoyed by Respondents in Petition-

ers' enforcement of the State's criminal laws prior to the injunction mandated by the Fifth Circuit, the Attorney General of Florida, as Amicus Curiae, respectfully urges this Court to grant the Petition for a Writ of Certiorari, so as to remove the prohibitory effect of the injunction and to enable Petitioners to comply with their lawful duties and responsibilities in the administration of the laws of Florida.

ARGUMENT

The Attorney General of Florida is in concurrence with the Petitioners in that it is indeed a "travesty" to deny the State Attorney's Office the necessary authority to initiate an investigation into food stamp recipients' files when there is reliable information available which demonstrates the fraud rate of said recipients to be as high as 40% in a given geographical region. The integrity of both the State Attorney's Office and the federal Food Stamp Program is here at stake. Because Congressional intent at the institution of the Food Stamp Program was to aid in the alleviation of hunger in America, and because hunger is an issue that is universally basic to all people, and because no law enforcement

agency in the State of Florida is more basic to the enforcement of the laws of Florida, the Attorney General of the State of Florida concurs with the Petitioners that these are "special and important reasons" pursuant to Rule 17.1, Rules of the Supreme Court of the United States, and thus a Writ of Certiorari should be granted.

The decision by the United States Court of Appeals for the Fifth Circuit has addressed an important question of federal law--one that has not been settled by this Honorable Court--and thus pursuant to Rule 17.1(c) of the Rules of the Supreme Court of the United States, this Court should grant certiorari. The decision in this cause by the Fifth Circuit is one which would seriously inhibit the investigatory powers of the

State Attorney's Office, even in the situation where the suspected fraud rate is as high as 40%. Where fraud exists in a program such as the federal Food Stamp Program, it is without question that the purpose of the program is being violated and abused. Since the purpose of the Food Stamp Program is to help in alleviating America's hunger, any incident of fraud committed against the Program serves to defeat the noble cause that the Program was designed to serve. The decision of the Fifth Circuit Court of Appeals further serves to emasculate the State Attorney's Office by prohibiting them from investigating other areas of suspected criminal activity. Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980).

In the investigation by the State Attorney into food stamp fraud in Nassau

and Clay Counties, Florida, it is important to note that the successful prosecution rate was in excess of ninety percent (90%). Now that the State Attorney's Office has been enjoined, it is of more importance to note that the prosecution rate, based on inquiry by the State Attorney, has in effect been reduced to zero.

As propounded by the Petitioners, the inquiry by the State Attorney into possible fraud actually promoted the ultimate purpose of the Food Stamp Act. According to 7 U.S.C. §2011, that purpose is "to safeguard the health and well-being of the nation's population by raising levels of nutrition among low-income individuals" and "to alleviate such hunger and malnutrition." It cannot be questioned that an effort to collar

and heel abusers of the Food Stamp Act is in reality an effort to ensure that funds are channeled to "low-income individuals." Of utmost importance is the public's perception that Food Stamp benefits are going to the truly needy, and the investigatory efforts of the State Attorney's Office likewise served that end. Further, the actions of the State Attorney helped to enforce a Florida Statute which renders food stamp fraud a state crime. The decision of the Fifth Circuit loses sight of these goals.

The Attorney General of Florida concurs with the Petitioners in that the effect of an injunction as was herein issued, which prohibits the distributing agency, Health and Rehabilitative Services (HRS), from releasing files to the State Attorney until HRS has deter-

mined that a reasonable suspicion of fraud exists, is to severely limit the investigatory power of the State Attorneys.

The Florida Supreme Court, in Eagan v. Demanio, 294 So.2d 639 (Fla. 1974), set forth the duties of the State Attorney's Office, which included: ". . . Investigating activity is necessary to the efficient execution of a prosecutor's duty." In compliance with that decision, a Florida District Court of Appeal has held "the State Attorney's power to investigate should not be lightly circumscribed by protective orders designed to accommodate the convenience of witnesses." Florida v. Seivert, 312 So.2d 788 (2nd DCA, Fla. 1975). Furthermore, the Florida Supreme Court has described the State Attorney as a "one-man grand jury."

Imperato v. Spicola, 238 So.2d 505, 506 (Fla. 1970).

The Attorney General of Florida acknowledges, as do the Petitioners in this cause, that the authority of the State Attorneys in Florida can never unconstitutionally intrude on a federally cognizable right. It is our contention, however, that no federal right has been pre-empted in the case at bar. The so-called rights, which Respondents claim to have been violated, are insufficient to sustain the injunctive relief granted.

Both the Fifth Circuit Court of Appeals and Respondents herein have failed to cite either statutory or regulatory provisions which expressly prohibit access to food stamp recipient files. Conversely, the Petitioners-Defendants have exhibited a reasonable

pursuit of legitimate functions in the Office of the State Attorney. They have likewise acted in a manner so as to promote the intent of the federal Food Stamp Act.

The Attorney General of Florida, as Amicus Curiae, urges this Court to examine the manner in which the Fifth Circuit interpreted the applicable regulations. Section 273.2(e), 7 CFR states: "The Applicant's right to privacy shall be protected during the interview." The Fifth Circuit in its interpretation of this regulation cites nothing that would indicate a broader intent than an interest in the confidential circumstances surrounding each particular interview. It is reasonable to interpret this regulation to mean that forthrightness by the applicant is encouraged for the interview.

Another regulation, 7 CFR §273.2(f), limits the circumstances in which a worker certifying an applicant's eligibility for food stamps can verify the information given by the applicant. As is the case with 7 CFR §273.2(e), this regulation is specifically limited to the application processing by the distributing agency. Indeed, Section 273.2 of 7 CFR is entitled "Application Processing". Thus, the interpretation given the regulation by the Fifth Circuit is misguided.

In 7 CFR §273.16(e)(2), the Fifth Circuit said the regulation indicated a careful limitation of referrals for prosecution to those "cases where individuals are suspected of committing fraud." Roberts v. Austin, 632 F.2d 1202, 1210 (5th Cir. 1980). The Attorney General

of Florida concurs with Petitioners that the purpose of this regulation is to "encourage" such referrals for prosecution. It is generally important as public policy to ensure that fraud in a program such as food stamps is vigorously pursued. This regulation goes on to say that referrals of fraud are encouraged, "particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one act." The intent of the regulation thus becomes apparent. HRS is to refer to the State Attorney for prosecution those cases of fraud which hurt the public purse the most. The cost of fraud to taxpayers and the integrity of the federal Food Stamp Program are the paramount

concerns. No other regulations prohibit the State Attorney from initiating his own investigation, nor do any suggest that referrals of fraud by HRS should be the only manner in which fraudulent schemes are investigated. The Office of the State Attorney shares an interest with this specific regulation [7 CFR §273.16 (e)(2)] in that both are concerned with the protection of the public purse and the integrity of the federal Food Stamp Program.

Thus, the injunction was based on regulations which nowhere expressly or explicitly limit the access of local law enforcement to food stamp recipient files. The regulations, upon which the decision of the Fifth Circuit rests, are designed to cover only the internal operations of the distributing agency (in

Florida, HRS). The language of 7 CFR §273.16(e) does, however, specifically acknowledge the authority of a state court to disqualify an individual from food stamp benefits "if the court finds the individual guilty of civil or criminal fraud." This disqualification is "separate and apart from any action taken by the state agency to disqualify the individual through an administrative fraud hearing." As the Petitioners emphatically point out, the regulations expressly recognize a procedure for disqualifying a food stamp recipient that is rendering the recipient ineligible, which is totally outside of the regulations. The state court system, with its procedures, thus becomes the proper outside channel. The Office of the State Attorney is one such authority.

The decision of the Fifth Circuit in Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980), would entirely preclude inquiries by the State Attorney's Office in cases which involved corruption by HRS caseworkers. The Fifth Circuit deals superficially and inadequately with this potentially realistic problem. Roberts v. Austin, supra, at 1211, expressly prohibits the release of a food stamp recipient's file to the State Attorney's Office until the state agency (HRS) makes a determination that there is some reason to suspect fraud. In a situation where an HRS caseworker is suspected of fabricating a fictional recipient or manipulating a particular recipient's file so that food stamps are over-issued and where the HRS worker obtains a monetary benefit from such scheme, there is little

possibility that HRS would ever make a determination that fraud was suspected in that case. It is important as a matter of public policy that a third, outside party have the investigatory power necessary to remedy such a situation. It is herein alleged that there is no party which more appropriately possesses such outside investigatory power than the State Attorney's Office.

Additionally, it is important to note, as was pointed out by the Petitioners, that it is entirely possible that not all state food stamp agencies are of the same level of expertise as is the Florida Department of Health and Rehabilitative Services. Those agencies may lack the requisite skill necessary to make an adequate determination of reasonable suspicion of fraud in a recipient's

file. In such event, the necessity for an outside investigator is imperative.

The Petitioners allege, and the Attorney General of Florida concurs, that the rendering of the primary prosecutorial agency, the State Attorney, to a position totally subservient to a prior determination by an HRS caseworker offends the concept of federal-state comity, as well as the integrity of the prosecutorial authority. Certainly, in a situation where there exists information in the hands of the State Attorney that the fraud rate among food stamp recipients may be as high as 40%, it is reasonable and of benefit to the tax-paying public for the State Attorney's Office to investigate such allegations. In fact, to ignore such information in the face of such evidence

would be dilatory on the part of any conscientious State Attorney.

Roberts v. Austin, supra, at 1213, uses the language "fishing expedition", and cites congressional discourse disapproving of the harassment of applicants in the verification process of the state food stamp program. As Petitioners state, and with which the Attorney General of Florida concurs, harassment and blind fishing should not be allowed. However, where a potential fraud rate of 40% is suspected, the legitimate authority of law enforcement cannot reasonably be referred to as harassment or a "fishing expedition".

The so-called intrusion by the State Attorney was de minimus. As logically pointed out by the Petitioners, it was no more intrusive than when a bank uses

typical verification procedures in approving loan applications. The Attorney General of Florida concurs with the Petitioners in this cause, that the release of the recipient's files to the State Attorney's Office by HRS was no more than a transfer of public documents. Davis v. United States, 328 U.S. 580 (1946). Additionally, since the State Attorney is an elected official who is clothed with the constitutional power to enforce Florida's laws, see Eagan v. Demanio, 294 So.2d 639 (Fla. 1974), he should have at least the same access as an auditor. 7 U.S.C. §2020(a). As Petitioners succinctly state:

> "The purpose of the Food Stamp Act cannot be promoted where existing techniques to ferret out fraud allow a fraud rate as high as forty percent (40%). Any regulations that perpetrate rampant fraud by stifling

> otherwise legitimate attempts to probe it should be struck down."

Petitioners do not request a free reign of investigatory power for the State Attorney's Office, but rather ask that where evidence is available that fraud is occurring at an unusually high rate, such investigatory powers of the State Attorney's Office should not be abridged.

The limitation imposed upon the State Attorney's investigatory power is unduly restrictive and contrary to public policy, in that the State Attorney is prohibited from initiating an investigation unless there has previously been an HRS determination. It is the position of this Amicus Curiae that it is reasonable, in accordance with Branzburg v. Hayes, 408 U.S. 665 (1972), that this Court could impose a prerequisite that

there be an exception to the State Attorney's investigatory power in "a general problem area." It is likewise reasonable to view a suspected fraud rate of 40% in a geographical area as a general problem area.

For the reasons stated herein, and the reasons likewise stated by the Petitioners, the Attorney General of Florida prays that this Honorable Court grant Petitioners' Petition so that the injunction imposed against them may be lifted.

CONCLUSION

For the foregoing reasons, on the basis of the authority cited, the Attorney General of Florida, as Amicus Curiae, respectfully requests this Court to issue a Writ of Certiorari to the Fifth Circuit Court of Appeals and to reverse the opinion rendered in Roberts v. Austin, 632 F.2d 1202 (5th Cir. 1980).

Respectfully submitted,

JIM SMITH
Attorney General

JOE BELITZKY
Assistant Attorney General

GERALD B. CURINGTON
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32301
Phone: 904/488-1573

Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L.

No. 80-1829

In the Supreme Court of the United States

OCTOBER TERM, 1980

T. EDWARD AUSTIN, ETC., ET AL., PETITIONERS

v.

ALICE ROBERTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether general disclosure of the files of food stamp recipients to a state prosecutor for investigation of fraud, absent any basis to suspect fraud, is consistent with the Food Stamp Act of 1977 and the regulations of the Secretary of Agriculture.

TABLE OF CONTENTS

Page

Statement 1

Discussion 3

Conclusion 8

TABLE OF AUTHORITIES

Case:

United States v. *Alaska Steamship Co.*, 253 U.S. 113 8

Statutes and regulations:

Food Stamp Act of 1977, 7 U.S.C. (Supp. III) 2011 *et seq.* 2

Section 5, 7 U.S.C. (Supp. III) 2014 1
Section 6, 7 U.S.C. (Supp. III) 2015 1
Section 6(b), 7 U.S.C. (Supp. III) 2015(b) 5, 6
Section 11(e)(3), 7 U.S.C. (Supp. III) 2020(e)(3), ... 3-4
Section 11(e)(8), 7 U.S.C. (Supp. III) 2020(e)(8) 5, 6, 7
Section 16(c), 7 U.S.C. (Supp. III) 2025(c) ... 5

Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, 94 Stat. 357 *et seq.* 7

Section 116, 94 Stat. 361-362 4
Section 117, 94 Stat. 362 5
Section 126, 94 Stat. 364-365 5-6
Section 127, 94 Stat. 365-367 5

Fla. Stat. Ann. § 409.325 (West 1973) 2

Page

Statutes and regulations—Continued:

7 C.F.R. :

Section 272.1(c) 5
Section 273.2(f) 4
Section 273.2(f)(1), as amended, 46 Fed. Reg. 3194, 3199 (1981) 4
Section 273.2(f)(2), as amended, 46 Fed. Reg. 3194, 3199 (1981) 4
Section 273.2(f)(4)(i), as amended, 46 Fed. Reg. 3194, 3201 (1981) 4
Section 273.2(f)(4)(ii), as amended, 46 Fed. Reg. 3194, 3201 (1981) 4
Section 273.2(f)(4)(iii), as amended, 46 Fed. Reg. 3194, 3201 (1981) 4
Section 273.2(f)(5)(ii), as amended, 46 Fed. Reg. 3194, 3201 (1981) 4
Section 273.16(e)(2) 6, 7

Miscellaneous:

46 Fed. Reg. (1981):

pp. 3200-3201 4
p. 4642 6
p. 4657 6
p. 7748 5
H.R. Rep. No. 96-788, 96th Cong., 2d Sess. (1980) 4, 5
S. 1007, 97th Cong., 1st Sess. (1981) 7
S. Rep. No. 97-128, 97th Cong., 1st Sess. (1981) 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1829

T. EDWARD AUSTIN, ETC., ET AL., PETITIONERS

v.

ALICE ROBERTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The Food Stamp Program is a cooperative effort by the states and the federal government in which federally-issued food stamps are distributed by state agencies to needy persons. Each participating state must adopt a plan for distribution of food stamps to eligible households under uniform national standards. 7 U.S.C. (Supp. III) 2014 and 2015. The federal government provides the food stamps to the states for distribution to eligible households and contributes substantially to defray the administrative expenses of the program; the stamps are redeemable at participating retail food stores.

In February 1979, petitioner Austin, a Florida State's Attorney, began an investigation of potential food stamp fraud, in violation of Fla. Stat. Ann. § 409.325 (West 1973), by requesting the Nassau County food stamp office to provide him with the files of all food stamp recipients in the county who received monthly food stamp allotments of $125 or more (Pet. App. 6-7). After receiving the files, petitioner Austin compiled information sheets on each of the recipients. The information sheets were then distributed to local police with directions "to conduct a criminal investigation and verify, through standard criminal investigative techniques, the information collected on these forms" (*id.* at 8). The State's Attorney asked the police "to contact neighbors, employers, and others who might be familiar with the household's circumstances to verify the information previously provided to the Food Stamp Program" (*ibid.*). Approximately 500 households were investigated during a six-month period (*id.* at 9). A similar investigation was carried out in Clay County (*ibid.*).

Respondents, food stamp recipients in Florida, filed this class action in the United States District Court for the Middle District of Florida, seeking declaratory and injunctive relief against petitioner Austin, other state prosecutors, and officials of the state agency responsible for administering the food stamp plan in Florida. Respondents charged that the state prosecutors' mass investigations violated the Food Stamp Act of 1977, 7 U.S.C. (Supp. III) 2011 *et seq.*, federal regulations issued pursuant to the Act, and Florida's agreement with the Department of Agriculture (Pet. App. 2-9).[1]

---

[1]Respondents also presented constitutional claims, but the court of appeals found it unnecessary to reach them (Pet. App. 38-39).

The district court denied respondents' motion for a preliminary injunction to prevent further disclosures *pendente lite* (Pet. App. 56-72). On appeal, the court of appeals reversed and remanded the case to the district court with instructions to issue a preliminary injunction "enjoining [the Florida Department of Health and Rehabilitative Services] from releasing food stamp files to the state attorney absent any basis to suspect that the affected households have committed fraud" (*id.* at 40). The court of appeals held that, in the absence of some reason for suspecting fraud, general disclosure of food stamp recipient files to state prosecutors and police is inconsistent with both the regulations of the Secretary of Agriculture and the Food Stamp Act (*id.* at 17-40).

DISCUSSION

The decision of the court of appeals represents a reasonable construction of the Food Stamp Act and the Secretary's regulations and does not conflict with that of any other court of appeals. Furthermore, the policy choices implicit in the existing balance between (1) the need for effective means of preventing and detecting fraud in the Food Stamp Program and (2) the need to protect food stamp recipients from unnecessary and intrusive investigations are currently under review in both Congress and the Department of Agriculture. Consequently, the decision below may be of little future significance. Review in this Court is therefore unwarranted.

1. Neither the Food Stamp Act nor the Secretary's regulations expressly prohibit the sort of investigation undertaken by the state prosecutors in this case. Nevertheless, both the statute and the regulations support the decision of the court of appeals (see Pet. App. 19-26, 32-36). Congress' concern for protecting the privacy of food stamp recipients and the confidentiality of the information submitted by applicants and recipients is manifest. Section 11(e)(3) of the

Act (7 U.S.C. (Supp. III) 2020(e)(3), as amended by the Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, Section 116, 94 Stat. 361-362), carefully limits the extent to which a state food stamp agency may seek verification of the information provided by applicants.[2] The state agency may seek verification *only* of the applicant's income, the size of his household, "such other eligibility factors as the Secretary determines to be necessary" (7 U.S.C. (Supp. III) 2020(e)(3)),[3] and such other "factors of eligibility involving households that fall within the State agency's error-prone household profiles * * * and * * * approved by the Secretary" (Pub. L. No. 96-249, Section 116, 94 Stat. 362).[4]

---

[2]"Verification is the use of third-party information or documentation to establish the accuracy of statements on the application." 7 C.F.R. 273.2(f).

[3]The Secretary's regulations specify items that must be verified (see 7 C.F.R. 273.2(f)(1), as amended, 46 Fed. Reg. 3194, 3199 (1981)) and those for which verification may be sought if "the information on the application [is] inconsistent with statements made by the applicant, inconsistent with other information on the application or previous applications, or inconsistent with information received by the State agency" (7 C.F.R. 273.2(f)(2), as amended, 46 Fed. Reg. 3194, 3199 (1981)). Documentary evidence is specified as the "primary source of verification" (7 C.F.R. 273.2(f)(4)(i), as amended, 46 Fed. Reg. 3194, 3201 (1981)); visits to the applicant's home and communications with individuals outside the applicant's household are strictly limited (see 7 C.F.R. 273.2(f)(4)(ii), (iii), and 7 C.F.R. 273.2(f)(5)(ii), as amended, 46 Fed. Reg. 3194, 3201 (1981)).

[4]"To be approved, the [error-prone] profile must: either meet the standard computer package developed by [the Food and Nutrition Service] or an alternate method approved by FNS; identify error concentrations with both statistical and practical significance; provide classification of errors within error-prone household categories; provide sufficient information to establish priorities in addressing corrective action to household categories prone to more than one type of error (primary factors in setting priorities should include such factors as the probability of error, the dollar losses, the number of households involved, and the geographic extent of the error); identify error concentrations with significant dollar losses; *and* meet other standards that FNS may prescribe." 46 Fed. Reg. 3200-3201 (1981) (emphasis added). See generally H.R. Rep. No. 96-788, 96th Cong., 2d Sess. 96-98 (1980).

Moreover, state agencies are expressly required to adopt "safeguards" that "limit the use or disclosure of information obtained from applicant households to persons directly connected with the administration or enforcement" of the Act or the Secretary's regulations. 7 U.S.C. (Supp. III) 2020(e)(8); see 7 C.F.R. 272.1(c).

Congress' attempt—suggested by the limited verification provisions described above—to reconcile the need to prevent fraud (and, of course, ordinary error) with the substantial privacy interests of food stamp recipients is also evident in the detailed fraud and error prevention mechanisms established in the Act. For example, in authorizing the Commissioner of Social Security to disclose wage and earnings information to state food stamp agency employees "upon written request" (Pub. L. No. 96-249, Section 127, 94 Stat. 365-367), Congress expressly provided that the information was to be disclosed only for "purposes of, and to the extent necessary in, determining an individual's eligibility for benefits" under the Food Stamp Program and required the states to establish safeguards for ensuring that it was used only for that purpose. See also Pub. L. No. 96-249, Section 117, 94 Stat. 362 (photographic identification); 46 Fed. Reg. 7748 (1981) (proposed rules concerning photographic identification requirements); H.R. Rep. No. 96-788, 96th Cong., 2d Sess. 98-101 (1980); 7 U.S.C. (Supp. III) 2015(b) (disqualification hearings); note 3, *supra*. Congress has recognized that "[t]he program need for certain information is great, but [that need] must be carefully balanced by the need to protect needy individuals from having their privacy bartered away in order to assuage their hunger." H.R. Rep. No. 96-788, *supra*, at 106.[5]

---

[5]Congress has also recognized the need to encourage state agencies to develop procedures to reduce their error rates, including both the denial of benefits to eligible individuals and the granting of benefits to ineligible individuals. See 7 U.S.C. (Supp. III) 2025(c), as amended, Pub. L.

In light of the care with which Congress has attempted to maintain this balance, it seems apparent that the sort of investigation conducted in Florida is inconsistent with the Act and the Secretary's regulations. If petitioners' view of the statutory scheme were correct, the carefully drawn limitations on verification would be rendered largely meaningless, as would the limitations on disclosure of wage and earnings information obtained from the Social Security Administration. While the state agency would be bound by these restrictions, the police and the prosecutors could ignore them. Furthermore, while the Secretary's regulations encourage the state agencies "to refer for prosecution under State or local fraud statutes *those individuals suspected of committing fraud*, particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one fraudulent act" (7 C.F.R. 273.16(e)(2) (emphasis added)), under petitioners' view the state agency may turn over the files of all recipients simply because they have been requested, whether or not any of the recipients are suspected of wrongdoing. Although the statute and regulations do not expressly govern investigations by state prosecutors, the investigations at issue in this case far exceed the limited verification procedures prescribed. Absent statutory or regulatory amendment, such investigations should not be permitted.[6]

No. 96-249, Section 126, 94 Stat. 364-365. Such procedures will almost certainly lead to the discovery of more attempts to defraud and, presumably, referrals for prosecution or administrative proceedings under 7 U.S.C. (Supp. III) 2015(b). See also 46 Fed. Reg. 4642, 4657 (1981).

[6]For purposes of this brief we assume (as the court of appeals apparently did) that petitioner Austin and the other prosecutors are "directly connected with the administration or enforcement of the provisions" of the Food Stamp Act or the Secretary's regulations (see 7 U.S.C. (Supp. III) 2020(e)(8)).

The thrust of petitioners' argument is that their goal is the "ferreting out [of] food stamp cheats" (Pet. 17) and that this goal is fully consistent with the statute (see Pet. 16-18, 23, 27-28, 31-32). While the federal government certainly concurs in the desirability of eliminating fraud in the Food Stamp Program, we submit that a much more selective approach to the problem is more consistent with the structure and purposes of the Act. See 7 C.F.R. 273.16(e)(2).

2. The Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, 94 Stat. 357 *et seq.*, made substantial changes in the procedures for preventing and detecting fraud. To the extent that petitioners urge that the sort of investigation conducted in this case is essential to the reduction of the asserted 40% fraud rate in Florida, these changes may have eliminated the basis for that argument.[7] More recently, the Senate adopted an amendment to Section 11(e)(8) of the Act, 7 U.S.C. (Supp. III) 2020(e)(8), providing that:

> notwithstanding any other provision of law, all information obtained under this Act from an applicant household shall be made available, upon request, to local, State, or Federal law enforcement officials for the purpose of investigating *a possible or alleged violation of this Act* or any regulation issued under this Act.

S. 1007, 97th Cong., 1st Sess. § 313 (1981) (emphasis added); see S. Rep. No. 97-128, 97th Cong., 1st Sess. 148, 65-66 (1981). The Senate Committee on Agriculture, Nutrition, and Forestry expressed its intention to make clear that law enforcement officials should have access to information provided by applicants "so long as they are conducting investigations to determine possible violations related to the Food Stamp Act" (S. Rep. No. 97-128, *supra*, at 65). If

---

[7]Although the amendments were adopted about six months before the court of appeals' decision, they had not been fully implemented at the time of the decision.

this provision is ultimately enacted,[8] the decision of the court of appeals will be moot. See, *e.g., United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920). In any event, the 1980 legislation, the implementing regulations, and the current rule-making proceedings (see page 5, *supra*), make review of the decision of the court of appeals unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
BRUCE G. FORREST
Attorneys

SEPTEMBER 1981

---

[8]No action on the bill has yet been taken in the House of Representatives.